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NOTES.

WE have before pointed out in these pages that the Courts have been of recent years engaged in elaborating under a system of judicial legislation, a whole body of principles with regard to the conflict of laws. The energy with which this legislative action is carried on is concealed from the public, and perhaps also from the judges, by the fact that principles of private international law constantly lie hid under rules of practice.

It is worth while to note briefly some of the conclusions with regard to the conflict of laws, and especially with regard to the limits of the jurisdiction, properly claimable by the High Court itself and by foreign Courts, which may be deduced from decisions contained in the Law Reports of the last few months.

1. The Privy Council has reaffirmed the general rule stated with brevity by Chief Justice Marshall, that 'the Courts of no country execute the penal laws of another,' and has apparently assumed that an action cannot be maintained in one country on a judgment given in another, if such foreign judgment was really obtained in respect of a penalty. To put the same principle in other words, the Courts of one country ought not, either directly or indirectly, to enforce the penal laws of another country. (*Huntington* v. *Attrill*, '93, A. C. 150.)

But in applying this principle care must be taken to distinguish between actions which are really 'penal' and actions which are only laxly so called. Where a private person, for example, under a Statute of New York brings an action for the enforcement of his private rights, the proceeding is remedial not penal, even though the right of the plaintiff to payment by the defendant may be in a certain sense a penalty imposed by statute on the defendant for his misconduct. A penal proceeding in short, in order to come within the general principle that its effect is merely local, must be a proceeding by or on behalf of the State. The Privy Council,

in short, adopts the admirable statement of the law given by Mr. Justice Gray of the Supreme Court of the United States, viz. the rule that 'the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, *but to all suits in favour of the State* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties,' but the Privy Council adds to this positive statement the negative one that a proceeding is not penal which is not in favour of the State. (*Huntington* v. *Attrill*, '93, A. C. 157.)

2. No foreign Court can pronounce a decree dissolving in England the marriage of a British subject who is domiciled in this country. It should particularly be noted that a divorce may be perfectly valid in the country where it is granted, and utterly invalid in England where the parties are domiciled, or, since the domicil of the wife depends on the domicil of the husband, where the husband is domiciled. (*Green* v. *Green*, '93, P. 89.)

3. A defendant cannot under Order XI, r. 1 (e) be served with a writ out of England in an action for a breach of a contract made in England, unless the alleged breach was the non-performance of some obligation which ought to have been performed in England. Thus if *X* a German contracts in England to pay *A* in Germany £100 for some service to be rendered by *A* in England, and though *A* has performed the service *X* who has returned to Germany does not pay the money, *A* cannot serve *X* with a writ or notice thereof, and in effect therefore cannot bring an action against *X* in England. (*The Eider*, '93, P. (C. A.) 119.) It is to be noticed that under the same circumstances were *A* in Germany and did not perform his part of the contract, *X* could sue him in England for non-performance of *A*'s part of the contract, since the services to be rendered by *A* ought to have been rendered in England. It is further noticeable that the Rules of Court as to service out of England, i. e. in effect as to the extra-territorial limits of the High Court's jurisdiction, give new importance to the old rules as to the place where a debt is presumably payable. (Compare *Robey* v. *Snaefell Mining Co.*, 20 Q. B. D. 152, and *Fessard* v. *Mugnier*, 18 C. B. n. s. 286.)

4. Under Order XI, r. 1 (g) a person who is out of England may be made a co-defendant in an action, e. g. of tort, and be served with a writ abroad where if he had been sole defendant service would have been impossible, and practically no action could have been maintained against him (*Croft* v. *King*, '93, 1 Q. B. 419). It is, however, essential in order that *Y* who is out of England may be thus made a co-defendant and served with a writ in an action against *X* and *Y*, that *X* who is in England should be a person

against whom an action *bonâ fide* lies. You cannot, that is to say, bring an action against *X* merely in order to get an opportunity for serving *Y* who is out of England with a writ (*Witted* v. *Galbraith*, '93, 1 Q. B. (C. A.) 577).

A dishonest agent is capable of causing a great deal of trouble to his principals and to other people,—a trouble unrelieved by the stern joy which lawyers feel in nice points. The moral which *Bryant* v. *La Banque du Peuple* ('93, A. C. 170) points to business men is the necessity of care in dealing with professed agents. A bank manager finds a company's agent armed with an elaborate power of attorney authorizing him to enter into contracts of purchase and sale, to draw accept and indorse bills and so forth, and on the strength of it he makes a loan against promissory notes of the company indorsed *per proc.*, and finds too late that the power does not authorize borrowing. Of course in such a case the taker is bound in law to ascertain the extent of the authority—its abuse, if the authority exists, does not signify to him—but the verbiage of such a document as the power in *Bryant* v. *La Banque du Peuple* is baffling to a business man accustomed to brevity. It is neither more nor less than a trap.

English Courts have no jurisdiction to entertain an action for trespass to foreign land.

This is the effect of the judgment of the House of Lords in *The British South Africa Co.* v. *The Companhia de Mocambique*, Times, Sept. 11, '93.

The judgment (though it reverses the decision of the Court of Appeal) will commend itself to all lawyers.

1. It finally establishes the salutary rule, which every one has long supposed—and as it now turns out rightly supposed—to be law, that the English Courts will not (subject to very rare exceptions, which are themselves anomalous and of doubtful expediency) entertain actions with regard to foreign land.

2. It reaffirms the principle that the Judicature Acts, being enactments for the improvement of procedure, must not be so construed, unless the intention of the legislature to the contrary is perfectly clear, as to give the High Court a wholly new jurisdiction.

3. The decision of the House of Lords, which in effect affirms the admirable judgment of Mr. Justice Wright, places one important part of the rules as to the conflict of laws on a clear and simple basis.

The Settled Land Acts, and the interpretation put upon them by the House of Lords in the *Ailesbury Case* ('92, A. C. 356), have so upset all the Chancery practitioner's fixed ideas about land settlement that he will only feel a mild thrill of astonishment at *Re Wythes, West* v. *Wythes* ('93, 2 Ch. 369). If an equitable tenant for life is, as to all intents and purposes he now is, the real owner, and invested with all the rights and powers of ownership, the Court may as well recognize the fact—indeed it is incumbent on it, failing some good reason to the contrary to recognize it—by letting him into possession and enabling him personally to exercise the powers and discharge the duties of an owner, only taking from him reasonable safeguards for repair, insurance, preservation of timber, the keeping down of interest on incumbrances, inspection by the trustees, and so on. Trustees will certainly not mind the innovation. It relieves them of a great deal of responsible and thankless trouble, not to speak of contentions with the tenant for life.

No one can feel surprised that solicitors should have taken a matter so important to them as their remuneration in respect of leases to the House of Lords (*Sarery* v. *Enfield Local Board*, '93, A. C. 218), but it would have been a most unfortunate thing if their contention as to the construction of the Remuneration Order had prevailed, indeed it would have frustrated the whole policy of the Act. The aim of the Act is to enable a client to know to a pound or two what the whole business he has in view, be it sale, mortgage, or lease, will cost him, the full extent of his liability free of any extras, and it may be that the very looseness of the language of the Order in speaking of 'preparing settling and completing a' lease, a looseness which Lord Herschell admits, was itself designed in an Order addressed as much to laymen as lawyers. Whatever the words may mean to the professional conveyancer there is no doubt the ordinary business man would understand them as covering the whole transaction. Furthermore the lump or, as Lord Shand would call it, 'slump' system of remuneration was meant to discourage and has discouraged the scandalous verbiage of conveyancers as well as the multiplication of legal documents. If a preliminary agreement was to be paid for extra there would be too a strong temptation to have one whether necessary or not. The scale may or may not be fair to solicitors, but certainty in charges is most satisfactory to clients and, in the end, to solicitors themselves. Uncertainty keeps away many a client just as it keeps many people from taking a cab.

Hill v. *Cooper*, '93, 2 Q. B. (C. A.) 85, illustrates a point on which we have often insisted, that the present position of a married

woman in respect to her contractual liabilities is utterly anomalous. A married woman who obtains a protection order under the Matrimonial Causes Act, 1857, sec. 21, would probably be thought by an ordinary layman to stand, as regards her liability on a contract, in the same position as a *feme sole*, for this is the interpretation which she would naturally put on secs. 25 & 26 of that Act. The decision in *Hill* v. *Cooper*, which follows *Waite* v. *Morland*, 38 Ch. Div. 135, shows that this interpretation is erroneous, and that a woman who has obtained a protection order may still possess property which she cannot make liable for her debts. We do not assert that *Hill* v. *Cooper* is wrongly decided. The decision follows logically enough from the view taken by the Courts of the position now occupied by a married woman. What we do assert is that this view greatly restricts the natural effect of statutes intended to place her very much in a position of a *feme sole*, and that the time has arrived for considering whether this intention ought not to be fully carried into effect by legislation.

Married women have enjoyed a great many triumphs over their creditors. The latest success scored by them is *Re Lynes, ex parte Lester* (68 L. T. R. 739), where the Court of Appeal have decided that a married woman carrying on a trade separately from her husband cannot be served with a bankruptcy notice under sec. 4 of the Act. The form, it has often been decided, must be strictly complied with, and, as framed, does not fit in with a judgment against a married woman, which only orders the debt to be paid out of her separate property. 'Calculators, economists, and politicians' as we are, in Burke's celebrated phrase, we still feel some lingering sentiment of chivalry towards the married woman who runs up bills she cannot pay for bonnets or bric-a-brac: but business is business, and if a married woman starts in trade she ought to do so on the sound commercial principle of paying her debts or taking the consequences. The origin of these anomalies is the narrow construction which the Court of Appeal in an unhappy moment put upon the Married Women's Property Act, 1882. Equity tradition was too strong for them. Hence a status historically intelligible, but logically indefensible and merely transitional, as the new Married Women's Property Bill testifies. In *Pike's* case (68 L. T. R. 650) Kekewich J. has recognized the married woman's proper quality of *feme sole* under the Act by holding her undertaking as to damages on an interlocutory injunction sufficient, however inadequate her separate property.

The Queen v. *Gyngall*, '93, 2 Q. B. (C. A.) 232, deserves special notice.

First.—The judgments of the Court of Appeal distinguish with great care between the common law jurisdiction of the Queen's Bench Division on an application for a writ of habeas corpus and the jurisdiction of the Queen's Bench Division since the Judicature Acts, as exercising the authority of the Court of Chancery for the protection of infants.

Secondly.—The case makes perfectly clear a point often forgotten by the public, and sometimes by would-be reformers of the law, that the Court when called upon to determine in whose custody a child should remain is not to look to the so-called right of the father or of the mother, but to the 'welfare,' in the wide sense of the term, of the child.

Thirdly.—The case establishes that the Court, when exercising the jurisdiction of the Court of Chancery as to the custody of infants, will not necessarily give the custody of a child to its mother, even though the mother has been guilty of no misconduct, if it is essential to the welfare of the child that it should remain in the custody of other persons.

No doubt the presumption is strong that a child had best live with the child's father or mother; but it is of great importance that the Court and the Legislature should remember that rules as to the custody of infants ought always to have for their object the benefit of the infant.

Haigh v. *West* ('93, 2 Q. B. (C. A.) 19) embodies a very salutary principle of our law. It is not merely to quiet possession that our Courts will presume a lost grant or even Act of Parliament. They seek a legal origin for a long-continued practice or possession because the life of a civilized nation postulates the reign of law. To admit that such a state of things had its origin in wrong would be for the Court to stultify itself. It may be said, this is an optimistic fiction, but on the whole it is not. The presumption is based like other presumptions of law on an observed uniformity, for example, to take the particular instance, that benefits enjoyed by the inhabitants of a parish have been mostly derived from grant or approved usage, not usurpation. Lawlessness there has been in our annals, but it has been rarer than many people think; and, when it has succeeded, it has almost always done homage to law by finding some plausible way to legalize itself at the earliest opportunity. The principle of 'none dare call it treason' applies to many lesser wrongs.

'Let next friends take care what they are about when they institute hostile actions in the names of infants.' Thus Lindley L.J. in

words of solemn warning (*Re Fish, Bennett* v. *Bennett*, '93, 2 Ch. (C. A.) 413, 422). One of the uses of a next friend is to supply the infant's want of discretion, but another and not less important use is to bear the brunt of battle in the matter of costs. As *Rhodes* v. *Swithenbank* (22 Q. B. Div. 577) shows he will not be allowed to evade this liability by compromising the infant's rights, and after the above dictum he had better not calculate too confidently on getting his costs back out of the infant's estate. This convenient fund, whether the estate is that of an individual or a moribund company, has been much too freely resorted to in the past. Judges have now grown chary of distributing the estate as James L.J. used to say 'in the usual manner among the solicitors.' It is almost certain too that with his own pocket in peril the next friend's judgment and vigilance will be remarkably quickened.

Taylor v. *Smith* (C. A.), noted in our April number from 61 L. J. Q. B. 331, is now reported in the Law Reports, '93, 2 Q. B. 65, with an apology for the case having been 'accidentally omitted.' The principle of this decision is really the same as that of *Page* v. *Morgan* (1885), 15 Q. B. Div. 228. Acceptance, as distinguished from receipt, under sec. 17 of the Statute of Frauds, means assuming possession of some part of the goods *with reference to the contract of sale and as being the goods appropriated to the contract.* In *Page* v. *Morgan* the evidence was much stronger than in this case, for the defendant had the wheat in question at his own mill. In *Taylor* v. *Smith* the deals were inspected and refused while they lay at the carrier's wharf.

An instrument made payable to '—— order,' the blank never having been filled up, is to be construed as payable to 'my order,' that is, the order of the drawer, and, when endorsed by him, is a valid bill of exchange under the Bills of Exchange Act, 1882, ss. 3, 5, 7. This, be it noted, is all that *Chamberlain* v. *Young*, '93, 2 Q. B. (C. A.) 206, actually decides. The judgments in the case certainly suggest the idea that when an instrument is issued as a bill of exchange, and taken as such, the Courts will not allow the parties thereto to escape from their obligations merely on account of small irregularities in the form of the bill.

A covenant by a tenant to keep a house in repair must be construed with reference to the condition of the house at the commencement of the tenancy. The tenant is not bound to guard against dilapidation naturally arising from defects in the original condition of the building. This is the effect of *Lister* v. *Lane*, '93,

2 Q. B. (C. A.) 212. The decision is good sense as well as good law. A man who undertakes to keep a house in repair does not undertake to build it anew.

The rules as to the extra-territorial jurisdiction of the High Court contained in Rules of Court '83, Ord. XI. r. 1, give new importance to the question, Where is it that money is presumably payable under a contract containing no definite provision as to the place of payment? *Thompson* v. *Palmer*, '93, 2 Q. B. (C.A.) 80, which should be read together with *Rein* v. *Stein*, '92, 1 Q. B. (C. A.) 753, and compared with *The Eider*, '93, P. (C. A.) 119, appears to determine that the place of payment must be determined in accordance with the general character and circumstances of each case, and that in many instances at any rate it may be presumed to be the place where the payee resides and carries on business. The general point worth notice is one to which we have frequently called attention, viz. that English judges are under R. S. C. '83, Ord. XI, r. 1, being led, almost against their will, to construct for the first time a theory as to jurisdiction.

St. Gobain, &c. Co. v. *Hoyermann's Agency*, '93, 2 Q. B. (C. A.) 96, decides in one sense a merely technical point, namely, that the R. S. C. Ord. XLVIII a, r. 11, does not under the term 'any person' include a person who is not a British subject, but in reality it lays down the principle that, speaking generally, our Courts do not claim jurisdiction over aliens when not in England, and will not allow this principle to be indirectly evaded by treating a foreigner who carries on business in England in a name other than his own as coming within Ord. XLVIII a, r. 11.

What is a *bonâ fide* traveller? This question has not only perplexed the Courts, but has excited, we suspect, more popular interest than any legal problem which has recently called for solution. According to the view of Mr. Justice Cave, any man is a *bonâ fide* traveller, or, at any rate, what is very much the same thing, must be presumed to be a *bonâ fide* traveller, if he walks more than three miles from his house, and his character as a traveller is in no way affected by the fact that his walk taken on a Sunday morning ends at a public house. According to Mr. Justice Hawkins and Lord Coleridge on the other hand, pedestrians who walk out however far on a Sunday merely or mainly to get drink, are not *bonâ fide* travellers, at any rate within the Licensing Act, 1874. Everything it would seem depends upon motive. This at least is the conclusion to be drawn from *Penn* v. *Alexander*, '93,

1 Q. B. 522. If a hundred artisans were to walk on Sunday morning more than three miles from their home to a place where there was both a public house and a fine view, and both looked at the view and drank their beer, they would be *bonâ fide* travellers if their real aim were to see the view, and would not be *bonâ fide* travellers if their sole or main object were to drink beer. No doubt therefore the question when a man is or is not a *bonâ fide* traveller may give room for infinite judicial casuistry. Still, like many questions which look difficult on paper, it is not hard to determine in practice. We admire Mr. Justice Cave's intellectual subtlety, still we find it impossible to doubt that the 130 working men who, between 10.44 and 11.20 on a Sunday morning, arrived from Northampton at the White Lion in Little Houghton, would never have come there had the beer been bad, and were just the kind of travellers whose travels Parliament did not intend to encourage. It must be allowed that a superior Court was hardly free to adopt the view expressed in the final *placitum* of 'Arabiniana': 'Prisoner, there can be no doubt of your guilt. You go into a public-house, and there you break bulk, and drink beer; and that 's what in law is called embezzlement.'

'Ut alienum non laedas.' How simple it seems! and yet what a tree, with what branches, that little grain of mustard seed has grown into. The maxim fetters our freedom at every turn in this overcrowded civilization of ours. The latest illustration of it, *Barber* v. *Penley* ('93, 2 Ch. 447), certainly goes beyond anything hitherto decided. If Mr. Penley had let off fireworks on his premises, or exhibited a pig-faced lady in his window, or even caricatures, or done anything reasonably calculated to attract a crowd, he would fairly have exposed himself to an injunction, but is a man who carries on his business in an orderly and quiet manner and does nothing to attract a crowd in the ordinary sense to be answerable for the idle and vulgar curiosity of a set of London loafers? Is a chemist, for instance, when a person in a fit is carried into his back parlour, to be answerable for the crowd who flatten their noses against his shop window? Chang, the Chinese giant, is a resident at Bournemouth. Is he responsible for persons who may collect to gape at him as he goes in or out? Is a professional beauty answerable, or a distinguished statesman? Popularity, moralists have long ago told us, is a perilous thing, but North J. has added a new terror to it if a popular actor must either clear the streets or discontinue his acting. The true remedy is in the police, and happily that excellent body is always found equal to the situation.

One would hardly have thought that it required a judicial decision to show the difference between a promise to pay an existing debt on demand and to pay a collateral sum on demand. In the former case the debt is due, though the payment is not to be made till the demand is made; in the latter case nothing becomes due till the demand is made. The distinction is well brought out in *Re J. Brown's Estate*, '93, 2 Ch. 300. A father and son jointly and severally covenanted with a mortgagor to repay the principal on demand, the father being merely a surety for the son to whom the mortgage money was advanced. Chitty J. decided that, as the covenant by the father was merely to pay a collateral sum, not a debt due from him, on demand, nothing became due from him, and the Statute of Limitations did not begin to run in his favour, till the demand was made. A promise not under seal to pay one's own existing debt is of course valid only if it in some way varies the existing obligation to pay, and then only if it is founded on a new consideration.

Drunkenness, as we know, is no excuse for crime. If it were so you might as well, as a learned judge once observed, shut up the criminal courts, because drink is the occasion of most of the crime committed: but on the question of intention, of the *mens rea*, drunkenness must now be deemed a material consideration, notwithstanding the strong remarks of Park and Littledale JJ. on Holroyd J.'s ruling in *Reg.* v. *Grindley* (1 Russ. Cr. 5th ed. 115). 'If the prisoner was so drunk as not to know what she was about,' said Jervis C.J. on a charge of suicide, 'how can you say she intended to destroy herself?' This was the case in *H. M. Advocate* v. *Kane* (3 White's Rep. 386). The prisoner in a fit of drunkenness had kicked his wife to death but knew nothing about it, and the jury under the guidance of Clark L.J. found it only culpable homicide. There is clearly however such a thing as a drunken intention, where malice exists, though the brain is besotted (*Reg.* v. *Doherty*, 16 Cox C. C. 308), and this kind of intention makes the drunkard as guilty in the eye of the law as if he had been sober. This is much the more common state. Delirium tremens is a disease and recognized as such by law, but drunkenness is a voluntary species of madness. Is there much difference in point of moral responsibility between the drunkard and the Malay who maddens himself with bhang and then runs *amok* murdering all he meets? The law cannot afford to coquet with theories of physiological irresponsibility. And how can the blank of subsequent memory prove that intention and malice were not present when the act was done?

'The general maxim that confessions ought to be voluntary is' says Stephen J. 'the old rule that torture for the purpose of obtaining confessions is (and has long been) illegal in England.' It is in fact a corollary from the generous principle of English criminal law 'Nemo tenetur prodere se ipsum.' This scrupulous fairness towards prisoners is characteristic of our law and highly commendable, and quite consistently with it our law recognizes that there are such things as moral thumbscrews, that a man may be trapped or threatened or cajoled into criminating himself. Where there is suspicion of such a thing it leaves it to the discretion of the presiding judge to admit or exclude the alleged confession. This is all, but from this root (that the confession must be voluntary) has grown up a highly artificial rule of evidence based, as so many of our rules of evidence unfortunately are, on a distrust of juries and their sagacity. 'It would be dangerous' it has been said, 'to leave such evidence to them;' 'it comes in too questionable a shape to be worthy of credit,' and so forth. The result is that what Erle J. called 'the best evidence when well proved' is too often excluded. A chairman mildly exhorts a defaulting secretary that 'it will be the right thing to make a statement' *Reg.* v. *Thompson* ('93, 2 Q. B. (C. C. R.) 12), and the Court treats the secretary's consequent confession as if it has been wrung from him on the rack. Most persons will agree with Parke B. that the rule 'has gone quite too far and that justice and common sense have too frequently been sacrificed at the shrine of mercy.' The time is past when rules of law could be defended on the bare ground of precedent.

A masterly inactivity may have its advantages, but it may also put a person in a deservedly unpleasant position. A person named as a trustee for instance, if he does not mean to act, should disclaim promptly. If instead of doing so he lets things go on and not only that but signs with his co-trustee a receipt for the trust money on an Inland Revenue form, what is the proper inference? Surely that he has accepted the trust. No other inference should be permissible, whatever the trustee's private intention may have been. He may indeed have signed merely for conformity, and then it is well settled he will not be liable if he has never received the money, though even then he may be, if he lets his co-trustee keep it too long: but the doctrine of signing for conformity has nothing to do with the question of accepting the trust. Wright J. in *Jago* v. *Jago* (68 L. T. R. 654) thought he would be straining the law to impute acceptance with its consequent liability, but in truth such conduct

by a named trustee is *pessimi exempli*. It deprives the cestuique trust of what he has a right to believe he has, the security of two trustees.

In reading Lord Young's and the other Scottish judges' defence of cockfighting (*Johnstone* v. *Abercrombie*, 3 White Rep. 432) a doubt at first crosses the mind whether one has not here some elaborate piece of irony like Erasmus' Praise of Folly, but no, it is a judgment of the High Court of Justiciary in solemn conclave. Shade of Charles Lamb! what material had been here for thy 'Imperfect Sympathies,' how would thy wit have played round the judgment-seat with its judicial sentiments of 'letting wise nature work her will,' of the *raison d'être* of game cocks and the catalogue of heroes from Themistocles to the Duke of Marlborough who have patronized this fine old pastime. It is sad, but true, that gentle Roger Ascham did commend this sport: but did not good old Isaac Walton also recommend a frog as 'the longest lived thing on a hook.' All that this historical research testifies to is the notorious fact that the care for animals is a sentiment of quite modern growth. Even now this care as embodied in our English statutes is so defective that it concerns itself only with domestic animals. It protects a tame rabbit while it leaves a wild one (even after capture, in fact a bag rabbit) to be tortured with impunity (*Aplin* v. *Porritt*, '93, 2 Q. B. 57). In England a cock is a domestic animal (*Budge* v. *Parsons*, 3 B. & S. 382). The Scottish Court refuses to recognize him as such, and by an obvious misapplication of the *ejusdem generis* rule of construction has outlawed, so to speak, the very bird whose fighting qualities they so highly appreciate.

The common law of England is notoriously unsentimental. It rests, as everyone knows, an action for libel not on insult, but on damage; an action for seduction not on outraged honour, but the parent's loss of service. This sordid view of the gist of the action has embarrassed modern judges, and in their anxiety to relieve against the narrowness of the common law they have given a very liberal interpretation to the word service. Still this fiction of service must, as Kelly C.B. said in *Hedges* v. *Tagg* (L. R. 7 Ex. 285), have some foundation, however slender, in fact. In the recent Irish case, *O'Reilly* v. *Glavey* (32 L. R. Ir. Q. B. 316) it was reduced to a minimum. The daughter-servant there, was a mature woman who had been a wife ten years and a widow two, who lived, not under her mother's roof, but in lodgings of her own, and was employed in a milliner's shop from 9.30 in the morning till 8 at night. Incidentally it may be mentioned that Clarissa had already got damages

out of the defendant for breach of promise. All that the so-called service consisted in was in her going occasionally to her mother's house and performing little acts of kindness, such as getting tea, helping to cook, and doing a little dusting. Yet this gratuitous kindness by a long emancipated daughter was held enough by a majority of the Court to found the action.

Midland Ry. Co. v. *Martin*, '93, 2 Q. B. 172, contains a brief and clear statement as to the effect of *res judicata*. No doubt where *A* has obtained against *X* satisfaction for a claim by one course of legal proceeding he cannot bring an action for the same subject-matter, but, as Mr. Justice Wright points out, it is absolutely essential for the application of this principle that the subject-matter should be in each case the same. When therefore a person obtains an order from a police magistrate under the Metropolitan Police Act, 1839, sec. 40, for the delivery up of goods improperly detained, he may nevertheless maintain an action for special damage arising out of the same detention. He uses no doubt two remedies, but his claim in the two cases is not for the same thing. He uses one remedy to get his goods back, he uses the other to obtain compensation for the special damage done to him by the detention.

A landlord lets a house to a tenant on the terms (*inter alia*) that the rent is reserved 'payable quarterly on the usual quarter-days, and always if required in advance.' The landlord demands payment in the middle of a quarter. The tenant contends that payment could have been demanded only on a quarter-day. In *London & Westminster Loan Co.* v. *L. & N. W. Ry. Co.*, '93, 2 Q. B. 49, the Court decide that under the circumstances stated the landlord has a right to demand his rent in the middle of a quarter. The decision is satisfactory, as it gives effect to what any ordinary man would suppose to be the meaning of the agreement, and the legal and logical grounds for the decision are well stated by Vaughan Williams J.

Buckley v. *Hull Docks Co.*, '93, 2 Q. B. 93, decides that all local venues existing before 1875 have been abolished, and that no local venues exist except those, if such there be, which have been created by statutes passed since the Judicature Act, 1875. This decision is pre-eminently satisfactory; it removes entirely technical difficulties in the way of bringing actions which probably ought never to have existed, and certainly ought long ago to have been removed. It is to be hoped that Parliament will abstain from

creating new local venues. But it is not at all certain that parliamentary legislation may not in this instance, as in others, fall behind judicial legislation.

'We think,' say the Court in *Roberts* v. *Potts*, '93, 2 Q. B. 33, 'that it was the intention of the Legislature to institute an entirely new method for the recovery of the tithe rent-charge—that it never could have been intended to work the old and new machinery together, and we think it would introduce confusion if questions relating to matters arising under the old law were allowed to be mixed up with matters arising under the provisions of the new Act' [i.e. the Tithe Act, 1891]. The principle here laid down is sensible and salutary: every one must hope that if there be an appeal from the judgment of the Queen's Bench Division, it may be held consistent with the terms of the different Tithe Acts. An infinity of confusion and of injustice would be saved if it were always possible thus to separate off the latest statute on a given subject from earlier enactments.

Now that so many persons live in flats, *Miller* v. *Hancock*, '93, 2 Q. B. (C.A.) 177, lays down a rule which is of considerable practical importance. That case decides that the owner of flats who lets them in the ordinary way is under a duty, not only to his tenants, but to strangers coming lawfully into the house, to keep them in a reasonably safe condition, and may therefore be sued by a stranger who is damaged, e. g. breaks his leg, through the stairs being left in an unsafe state.

The decision of the Court in this case, and the principle on which it rests, are reasonable. The case is, however, an example of the tendency of the Courts, no less than of Parliament, to increase the liabilities of landowners. This tendency corresponds with the moral feeling or the sentiment of the day, and finds its expression in judicial legislation. It is well, however, that the judges should bear in mind that the idea of an implied duty is a very elastic one, and that it is quite possible so to extend it as to increase the obligations imposed upon owners of property beyond the limits of justice and expediency.

The Walter D. Wallet, '93, P. 202, affords a good instance of the way in which an established legal principle may be rightly applied so as to include a new case. In the *Walter D. Wallet* it is in effect

laid down that an action lies at common law for the malicious arrest of a ship by admiralty process. This doctrine cannot, it is stated, be supported by any direct precedent, but as Sir Francis Jeune well lays down, 'the onus lies on those who dispute the right to bring such an action of producing authority against it.' It would be utterly unreasonable to allow process of law to be abused simply because the abuse took place in an admiralty action.

The decision in *Tadman* v. *Henman*, '93, 2 Q. B. 168, is a logical application of the constantly misunderstood principle of estoppel. *X* lets land to which he has no title to *N*. *A* brings goods of *A*'s upon the land. Though *N* the tenant is estopped from disputing *X*'s title as lessor, *A* is clearly not estopped from disputing it. The consequence is that *X* cannot as against *A* exercise his rights as landlord and distrain *A*'s goods in payment of rent due from *N*.

The Bering Sea Arbitration has turned out well, but there has perhaps been a little too much gush over it. We do not think it is usual among gentlemen to congratulate one another effusively on keeping their word: and the possibility of such compliments between citizens of different states in matters between those states really goes to show the backwardness of international morality. Something is gained, no doubt, for the principle of arbitration. But the success of such a proceeding in a matter of purely commercial interest between nations of a common stock, language, and law, does not bring us much nearer to the solution of points of ambition and honour between neighbours and rivals who are really foreigners to each other.

Part V. of the Dictionary of Political Economy (Macmillan & Co.) contains an article on Domesday Book by Mr. F. W. Maitland, whose name is ample warranty of sound and safe learning in early English law. The recently completed edition of the Devonshire Domesday came before the Devonshire Association at Torquay in the last week of July. Sir F. Pollock read a paper on the general features of the Devonshire survey, especially as regards the contrast between the assessed and the actual value of the land; Sir John Phear criticized the translation published with the text by the editing Committee of the Association; and Mr. R. N. Worth dealt with the identification of place-names, of which he prepared a provisional list some months ago. This last matter is unusually troublesome in Devon by reason of the great number of equivocal names. A whole string of Bucklands and of Leighs has to be sorted out,

and many less common names occur in duplicate or triplicate. Much intelligent local work is needed before we can get near the bottom of Domesday, and the example of Devonshire cannot be too much commended.

We are sorry to learn from the Canadian Law Times that in the recently founded Law School of Toronto the authorities have made their appointments of teachers for a fixed term of three years. Can they be aware that this system has now been discarded even by the Inns of Court at home? As to its folly, we cannot improve on the form in which our Canadian colleague delivers judgment on it: 'If the staff is to be changed every three years it means that experience is not to be considered as a qualification for a lecturer.' Those who maintain such a system have their choice of two theories. One is that any practising barrister can teach law. The other is that law cannot or need not be taught at all, and that if law lectureships are established as a sop to public opinion they should be treated as a lucrative perquisite to be passed round among members of the Bar of a certain standing whose time is not fully occupied with practice.

It will be seen by Mr. H. M. Humphry's article in this number that the Law Reports have suppressed all mention of a most important and beneficial improvement in practice. 'The most interesting part of the judgment from a public point of view is omitted from the authorized report.' What have the editors and the Council to say to this?

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

WHAT IS A CHOSE IN ACTION?

THE phrase 'chose in action' has been used in various meanings; at the present day it bears a meaning in some respects less extensive and possibly in other respects more extensive than it originally bore.

The following definitions of a chose in action have been given:

'Things in action is when a man hath cause or may bring an action for some duty due to him, as an action of debt upon an obligation, annuity, or rent, action of covenant or ward, trespasse of goods taken away, beating or such like: and because they are things whereof a man is not possessed, but for recovery of them is driven to his action, they are called things in action.' Termes de la Ley, s. v. *Chose in Action.*

'Property in chattels personal may be either in possession, where a man hath not only the right to enjoy but hath the actual enjoyment of the thing, or else it is in action: where a man hath a bare right without any occupation or enjoyment.' 2 Bl. Comm. 389.

'Property in *action* or such where a man hath not the occupation but merely a bare right to occupy the thing in question: the possession whereof may, however, be recovered by a suit or action at law from whence the thing so recoverable is called a thing or *chose in action.* Thus money due on a bond is a *chose in action*, for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises or covenants with me to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose in action*, for though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be can only be ascertained by verdict, and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe that the property or right of action depends upon an express contract or obligation to pay a stated sum, and in the latter it depends upon an implied contract that if the covenantor does not perform the act he engaged to do he shall pay me damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts either express or implied which are the only regular means of acquiring a *chose in action.*' 2 Bl. Comm. 396.

'Chose in action is a thing incorporeal, and only a right: as an annuity, obligation for debt, a covenant, voucher by warranty, and generally all causes of suit for any debt or duty, trespass or wrong,

are to be accounted choses in action. And it seems that chose in action may also be called chose in suspense, because it has no real existence or being, nor can properly be said to be in our possession.' Blount, Law Dict., s. v. *Chose in Action.*

'The term choses in action appears to have been applied to things, to recover or realize which, if wrongfully withheld, an action must have been brought: things, in respect of which a man had no actual possession or enjoyment, but a mere right enforceable by action. The more important things recoverable by action only were money due from another, the benefit of a contract, and compensation for a wrong or damages: and these have always been the most prominent choses in action, though not the only things included in the term.' Williams, Pers. Prop. 9.

'In modern times also several species of property have sprung up which were unknown to the common law. The funds now afford an investment of which our forefathers were happily ignorant, whilst canal and railway shares and other shares in joint-stock companies and patents and copyrights are evidently modern sources of wealth. These kinds of property are all of a personal nature, many of them having been made so by the Acts of Parliament under the authority of which they have originated. For want of a better classification these subjects of personal property are now usually spoken of as "choses in action." They are, in fact, personal property of an incorporeal nature, and a recurrence to the history of their classification amongst choses in action will, as we shall hereafter see, help to explain some of their peculiarities.' Williams, Pers. Prop. 13.

It will be observed that 'chose in action' includes money due and the benefit of a contract according to all these definitions, that it includes a tort according to all the definitions except that given by Blackstone, that it includes patents and copyrights according to Williams, while Blackstone excludes them, as he restricts 'chose in action' according to his second definition to rights arising from contract.

Property of which the owner is out of possession may be divided into three classes:—

(1) Where it is a specific chattel, including goods purchased but not delivered;

(2) Where it is a contract, not being a contract for the sale of goods, or money payable otherwise than under a contract;

(3) Patents, copyrights and trade marks.

Property of the first class may be distinguished from property of the second and third classes because it is possible for the owner to obtain actual possession of it, while this is not possible in the case of property of the second and third classes.

At the present day the owner of a specific chattel, of which he is not in possession, has, with some possible exceptions, which I shall

not discuss, rights over the thing itself, and therefore he is generally said to own the thing itself, as distinguished from having a mere right of action. If the owner bails goods, he can sell them so as to pass the general property to the buyer, while the special property remains in the bailee, or, to use other language, he can transfer the ownership while the right to possess remains in the bailee. If the bailee wrongfully delivers the goods to a stranger so as to determine the bailment, the owner can bring an action for the injury done to his right to possess against both the stranger and the bailee [1].

Where a man is the owner of property of the second class, he has no rights over a specific thing, all that he has are rights against the other party to the contract or against the debtor; these rights are capable of being enforced by action, and hence they are properly called choses in action. The rights of the owner of a chose in action in this sense of the word are entirely different from those of a bailor. At common law a creditor could not assign his debt, and nothing that the debtor could do would give to the creditor a right to recover the debt from a stranger. Blackstone's definitions include property of both the first and second class under choses in action, but as I have already pointed out, property of the first class is not generally spoken of as a chose in action at the present day.

It is, however, right to point out that if the true distinction between a chose in possession and a chose in action is, as suggested by Lord Thurlow, *Dundas* v. *Dutens*, 1 Ves. Jun. 196, 1 R.R. 112, and by Lord Blackburn, *Colonial Bank* v. *Whinney*, 11 App. Ca. at p. 439, that the former can and that the latter cannot be seised by the sheriff at common law under a *fi. fa.*, Blackstone's definition is not too extensive, as where the debtor's goods are bailed his interest in them cannot be seised at common law. Bro. Ab. *Pledges* 28, *Execution* 107.

Probably the solution of the difficulty is that the phrase 'chose in action' is used in two different meanings; in the more extensive meaning it includes specific chattels of which the owner is out of possession, but at the present day it is more commonly used in a more restricted meaning, namely, in cases where the owner has rights against a person (which includes a corporation) under a contract, or for the payment of money other than under a contract.

It will be observed that this definition includes shares in companies. For what are shares? They are merely the proportion in the capital stock of the company which belongs to each member.

[1] [We need not here regard the distinction between trover and a special action upon the case. – Ed.]

The owner of the shares can enforce his rights, whatever they may be, against the company by action, he has no rights over any specific chattel belonging to the company. It has been held, however, that for some purposes shares in companies are not, or at any rate are not merely, choses in action.

A source of confusion should be stated: Where the chose in action is evidenced by a deed or writing, we often speak of the parchment or paper as a chose in action. For instance, we sometimes say that a bill of exchange, a bond, or a policy of assurance is a chose in action. In this case we are using a figure of speech, as it is possible for the paper or parchment to belong to one man and the money secured by it to another. 'A man may give or grant his deed to another, and such a grant by parol is good .... If a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, viz. the parchment and wax, to another, who may cancel and use the same at his pleasure,' Co. Litt. 232 a, b (see the cases collected, Goodeve, Pers. Prop., by Elphinstone and Clark, 90, note *c*, and *Crossley* v. *City of Glasgow &c. Co.* 4 Ch. D. 421).

The rights of the owner of a patent, copyright, or trade mark do not arise from contract; he has no rights over a specific chattel, nor against any particular person; but he has rights that he can enforce against the whole world. These rights are negative, namely, that no person shall commit certain acts; and till a person commits such acts the owner has no cause of action. It appears, therefore, probable, though the point has never been decided, that property of this nature is not a chose in action.

It may be objected that where a debt is payable at a future time no right of action exists till that time, and that therefore if we refuse the name of chose of action to patents, merely because the owner cannot bring an action against any person unless he does wrong, we ought equally to refuse the name to a debt payable *in futuro*. There is, however, a difference between the cases. In the case of a patent no lapse of time will give a right of action against any person except a wrongdoer, in the case of a debt payable *in futuro* mere lapse of time will give a right of action against the debtor.

Rights against a tortfeasor are included in choses in action as defined by Blount, Williams, and in the Termes de la Ley. It is, however, difficult to see how they can be regarded as property. If *A* enters into a contract with *B* to do or abstain from doing something, or if money is due from *A* to *B*, *A* always knows what he ought to do; he ought to perform the contract or pay the money. On the other hand, if *A* has committed a tort against *B*, it is impos-

sible to say what is the recompense that he ought to make to *B*; the amount must necessarily remain undefined till it is determined in an action or by an agreement between the parties. It appears somewhat difficult to class a mere expectation of damages among property, and if it is not property it is not a chose in action. Common law recognized a distinction between an assignment of rights against a wrongdoer and an assignment of rights arising under a contract or in respect of money due. Although the assign of rights of the latter kind could not bring an action to enforce them in his own name, the assignment was not absolutely void, he was allowed, if so authorized by the assignor, to bring an action in his name. On the other hand, an assignment of rights against a tort-feasor was absolutely void, not only at law, Y. B. 34 H. 6, 30, pl. 15, but in equity, *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481, on the ground of champerty.

On the whole, it may, I think, be said that according to modern usage the phrase 'chose in action' includes only money due, whether under a contract or not, and contracts of every nature except contracts for the sale of goods, where the word contract is used in its widest meaning so as to include shares in companies. The phrase is never at the present day used in the meaning of a right of action in respect of a tort; and it is, perhaps, doubtful whether it includes patents, copyrights, and trade marks.

HOWARD W. ELPHINSTONE.

CONTRACT BY LETTER.

IT is a settled rule that where the parties to a contract are at a distance from one another, and have recourse to the post or telegraph to exchange offer and acceptance, the contract is complete from the moment of the despatch of the acceptance.

In principle this was decided in *Adams* v. *Lindsell* (1818), 1 B. & Ald. 681, in which case the defendant offered to sell wool to the plaintiff, and on September 2, 1817, sent him a letter containing the offer, which being misdirected did not reach the plaintiff till the 5th. He returned answer the same evening accepting the offer. The defendant had in the meantime sold the wool to others, supposing from the delay that plaintiff would *not* accept. The defendant maintained that there could be no contract until plaintiff's acceptance had actually been received. But the Court said:—'If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs until the answer was received, then the plaintiffs ought not to be bound until after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is concluded by the acceptance of it by the latter.'

The rule received confirmation in *Household Fire Insurance Company* v. *Grant*, (1879) 4 Ex. D. 216, in which Lord Justice Thesiger held that as soon as the letter of acceptance is delivered to the post-office the contract is as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself, as his agent to deliver the offer and receive the acceptance.

Adams v. *Lindsell* it will be observed assigns *convenience*, while Lord Justice Thesiger's decision suggests something similar to *the effect of Agency*, as the ground of the rule.

The ground on which Lord Blackburn put it in the earlier case of *Brogden* v. *The Metr. Ry. Company*, (1877) 2 App. Ca. 666, 691 (which was quoted by Lord Justice Thesiger in *Household Fire Insurance Company* v. *Grant*), was that 'the acceptor in posting the letter has put it out of his control and done an extraneous act which

clenches the matter and shows beyond all doubt that each side is bound.' And Lord Justice Thesiger adds:—'How then can a casualty in the post unbind the parties or unmake the contract?'

This was with reference to the circumstances of the case in *Household Fire Insurance Company* v. *Grant*, in which there had been a casualty in the post that had prevented the delivery of the letter of acceptance.

Intermediately between *Adams* v. *Lindsell* and *Brogden* v. *Metr. Ry. Company* doubts had been felt as to the application of the rule to cases where the communication by which acceptance had been signified had been lost or delayed in transmission. In *Dunlop* v. *Higgins*, (1848) 1 H. L. Ca. 381, Lord Cottenham had held that the posting the acceptance concluded the contract whatever might have befallen the letter, which in that case had arrived six hours later than had been expected. In *Reidpath's* case, (1876) L. R. 11 Eq. 86, Lord Romilly decided that if the letter of acceptance was not received there was no contract.

In *British and American Telegraph Company* v. *Colson*, (1871) L. R. 6 Ex. 108, it was held by the court of Exch. (Kelly C.B.) that the contract was not binding till the letter of acceptance was received, but when received it related back to the moment of posting.

In *Harris's* case, *in re Imperial Land Company of Marseilles*, (1871) L. R. 7 Ch. 587, it was decided that though the contract was complete at the time of posting the acceptance, yet it was subject to a condition subsequent that if the letter did not arrive in course of post, the parties may act on the assumption that the offer has not been accepted. But the views entertained in these two cases were negatived by the decisions in *Household Fire Insurance Company* v. *Grant*, as above explained.

Now it is the plainest common sense that an offer made by one person, *A*, cannot be accepted by another, *B*, until *A* is communicated with by *B* on the subject. There must be some expression by words or conduct on the part of *B*, giving *A* to understand that *B has* accepted.

For instance, if *A* and *B* are distant 100 miles from each other, it would not be sufficient for *B*, however completely he might agree with *A*'s offer and might desire to accept it, to write his answer accepting, and place it in his pocket or in a drawer; or to go into his garden and there shout out that he accepted the offer. There must be a communication with *A*. And the only real ground on which the decision in *Household Fire Insurance Company* v. *Grant* can be sustained is that the posting of the letter of acceptance *is* a communication with the offerer. This can only

be so if the post-office for the occasion becomes an extension of the personality of the offerer, so that posting the letter of acceptance *is*, at once, a communication with him.

Now all agency acting within the scope of the authority given it, is an extension of the personality of the principal, and if the post-office be regarded as the agent of the offerer to receive the return message from the person to whom the offer is made, then on the return message being posted, it *is* at once communicated to the extended personality of the offerer.

The post in this view is not the agent of the offerer to *bring* the return message to the normal personality of the offerer, but, as his extended personality, to *receive* the return message, and this alone explains how it is that, though a letter accepting the offer be lost in the post, the contract is yet complete from the moment of posting, for it has already reached the extended personality of the offerer. This view also affords the only explanation possible for the decision that no subsequent revocation of the acceptance can take effect. Lord Blackburn, in the case quoted above, indeed says that 'the acceptor has by an extraneous act (that of posting the letter) put it (the acceptance) out of his control.' But is this so? Suppose that *A* and *B* instead of being 100 miles apart are in a room together, *A* being stone deaf. *A* has made his offer, and *B*, not being able to make *A* hear, decides to communicate with him in writing. He writes his answer accepting, and proceeds to hand it to *A*; but suddenly, entertaining doubts about the matter, he withdraws his hand which was approaching *A*, and writes another note, which he then hands to *A*, refusing the offer. The contract is clearly not made. There was no communication of acceptance.

Suppose again that the parties were at a distance in places devoid of postal communication, and *B* despatched his own messenger with a letter of acceptance; and that, some time afterwards, changing his mind, he sent another man to recall his messenger. It can scarcely be contended that the contract was complete by the despatch of the first messenger, and that *B* could not recall his acceptance by sending a second messenger to recall the first, before delivery of his despatch to *A*.

But suppose there were two ways of getting to *A*, and that *B* did not know by which route his messenger had gone, and could not therefore depend on his second messenger coming up with the first and being able to recall him. He would then, we will suppose, write off to *A* refusing the offer, and send the second messenger with all speed with instructions to reach *A* as soon as possible and deliver the note to him, and prevent the first messenger from delivering his message.

Assuming that the second messenger was able to forestall the first in delivery of his note to *A*, it will be admitted that there would be no complete contract. Now suppose *B*, instead of sending a private messenger, employs the post-office. We will take it for the sake of argument that the post-office is *his agent alone* for the purpose of transmitting the acceptance. By the rules of the post-office a letter once posted cannot be recalled, but its arrival at its destination can be forestalled by a telegraphic despatch. He employs the telegraph for this purpose, and revokes the acceptance sent by the post.

Here, then, assuming as before that both the telegraph and post are the agents in this matter *of B alone*, it is quite clear that there is no communication with *A* until the arrival of the second message recalling the first, and there is no completed contract.

In such circumstances the extraneous act of posting the letter has *not* put the acceptance beyond the acceptor's control.

If, however, we regard the post-office *as the agent of the offerer as well as of the acceptor*, the moment of despatch is also the moment of communication to the extended personality of *A*, and the contract is at once complete. There is no room for revocation.

Lord Justice Thesiger held in *Household Fire Insurance Company* v. *Grant*, that the post in such a case was the agent of the offerer *to bring back* the return message, but on the view here put forward it is necessary, as has been shown, to regard it as the agent of the offerer *for the reception of the message*.

But it may be objected that cases may occur in which the offerer did not expressly make the post his agent. In fact in the majority of cases nothing would be said as to the acceptance of the offer by post. But in all cases a *speedy* acceptance is desired.

If the most speedy of all means of transmission were looked for, the telegraph or telephone would doubtless be prescribed by the offerer. Where either of these was not prescribed the post would be regarded as the means of transmission contemplated by the offerer, in accordance with the ordinary usage of mankind, as in the recent case of *Henthorn* v. *Fraser*, '92, 2 Ch. 27, C. A.

A left with *B* an offer of the refusal of certain property. *B* on the next day, at 3 P. M., sent off an acceptance by post. At 1 P. M. *A* had sent a letter recalling his offer. His communication only reached *B* at 5 P. M. Lord Herschell and Lindley L.J. say, 'When the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.' On the views ordinarily entertained of the proper way

of accounting for the completeness of the contract at this point, the question will still arise:—But what if the acceptance is never actually received by the offerer through the post? On the view on which Lords JJ. Baggallay and Thesiger proceeded in *Household Fire Insurance Company* v. *Grant*, they considered that it did not matter, because there was '*a constructive delivery*.' This appeared unsatisfactory to Lord Bramwell, who urged that there must be some agreement to dispense with communication in such cases: otherwise there can be no complete contract.

If, however, we regard the post as impliedly authorized by the offerer to *receive the return message*, in all cases in which by the general usages of mankind the post would be the means of communication, then the offerer extends his personality through the post, as his agent for the reception of the acceptance or refusal of the offer, and there *is* a communication with him through this his extended personality at the moment of posting. If the communication does not reach him, that is an affair between him and his extended personality, and does not affect the completeness of the contract at the moment of the posting of the acceptance. It is as though the acceptor, being on the spot, had chosen to deliver personally to the offerer his written acceptance, and the offerer had personally received into his hand from the acceptor the note containing the acceptance, but had dropped and lost it before he had had an opportunity of reading it. Nevertheless the acceptance having been signified to the offerer the contract is complete.

L. C. Innes,
(late Judge of the High Court, Madras).

THE REORGANIZATION OF PROVINCIAL COURTS.

MUCH has been heard lately of reform in the High Court of Justice. No part of our system, however, has more need of remoulding than the provincial courts, and no portion of these has been more troublesome to construct or caused more difference of opinion than the County Court.

In addition to the jealousy that without doubt prevails at the gradual encroachment by the County Court upon the jurisdiction of the High Court, this difficulty is attributable to the conflicting views of the architects. One party strives to make the County Court if not the High Court in itself yet an integral part of it, whilst the other views it as a system whose true function is the collection of debts and the decision of petty cases. Both these views seem to be erroneous, and when they meet in legislation the progeny of the two is a hybrid growth presenting strange anomalies and want of symmetry.

In irregular and anomalous jurisdiction, however, the County Court is by no means singular, indeed it is rather a type of the whole of the English lower courts.

Whilst the organization of the Supreme Court has been the object of elaborate care and lavish expenditure, the whole of the systems beneath are the outcome of intermittent and unsystematic legislation, which apparently has followed no plan but the convenience of the moment.

Below the Supreme Court practically the whole of our judicial system would seem to be included in the following Courts:—

(1) Justices in Petty Sessions.
(2) The County Court.
(3) The Quarter Sessions.

Petty Sessions, with their miscellaneous jurisdiction concerned with subjects of every kind, from imprisonment for assault to the granting of alimony to deserted wives, are not dealt with in this article.

Of the other two courts the County Court has a jurisdiction purely civil, whilst Quarter Sessions, though their jurisdiction is primarily criminal, have civil jurisdiction of considerable importance. The justices in Quarter Sessions assembled are also vested with duties municipally administrative.

The history of Quarter Sessions for some time past has been that

of a process of transformation from its old form. Whilst laymen still preside over rural Quarter Sessions, in nearly all populous places the need of better administration has caused the justices to be supplanted by judges, who are usually simply practising barristers paid salaries from £40 a year upwards. By the Local Government Act, 1888, also nearly all the municipal duties of the justices in Quarter Sessions have been transferred to the County Councils, and what remains might with advantage be included.

Yet the Quarter Sessions is a court of much importance. In dignity it stands next to the High Court and only counsel have audience at its bar. It has cognizance of nearly all offences that can be dealt with by the Supreme Court, and it has power to impose long terms of penal servitude. By the Assizes Relief Act, 1889, moreover, all crimes triable at Quarter Sessions must be disposed of there, and the great bulk of the criminal work of the country is thus thrown upon the Quarter Sessions. Its civil jurisdiction also is not only important but of considerable intricacy. The following is an approximate list of those subjects over which it has civil jurisdiction and of those criminal matters in which the jurisdiction is simply appellate:—

Appeals against affiliation orders.
Appeals against complaints and orders regarding lunatics.
Appeals against highway certificates.
Appeals under the Enclosure Acts.
Appeals against County, Highway, and Poor Rates.
Appeals against the valuation lists of Poor Law Unions.
Appeals against pauper lunatic orders.
Appeals against orders for the removal of paupers from one Union to another.
Appeals against the appointment of overseers.

Appeals against orders by Petty Sessions for imprisonment without the option of a fine.
Appeals against orders or complaints under statutes relating to the excise, customs, stamps, taxes, and post office.
Appeals under the Factory and Workshops Act.

These are all subjects of difficulty. Such actions as rating appeals indeed frequently involve most intricate points of law, and to be dealt with satisfactorily require not only keen legal acumen but considerable technical knowledge of surveying and kindred subjects.

Not much fault, I believe, has been found with the criminal justice administered at Quarter Sessions, but in the country

districts it is rough and ready though generally leaning to the side of mercy. In the rural courts, however, the same cannot be said of the civil contentious work, the real responsibility for which is thrown too much upon the Clerk of the Peace in his capacity of legal adviser to the Court. The sight of a group of puzzled country gentlemen being instructed in the judgment they are to deliver upon a case involving a difficult knot of points in rating law, after elaborate arguments by counsel, though amusing is very unedifying. This dual administration—of the facts by the justices and of the law by the Clerk of the Peace—should not be tolerated for an hour in a Court of the rank of Quarter Sessions.

The constitution of Quarter Sessions, moreover, is vague and, outside of the common routine, but little understood. The law relating to it scattered about in ancient Acts of Parliament (beginning with 34 Ed. 3, c. 1), old decisions of the High Court, and opinions of old text-writers, is difficult to find and greatly needs revision and consolidation. In many ways also it is out of date and cumbrous in the extreme. Such examples as the following,—that a witness subpoena issued from Quarter Sessions can only be enforced by an indictment for disobedience; that costs must be taxed by the Court itself, even though it may adopt the figures of the Clerk of the Peace (*Sellwood* v. *Mount*, 1 Q. B. 726); and that costs must be taxed before the rising of the Court on pain of being irrecoverable (*Reg.* v. *Long*, 1 Q. B. 740),—are mere instances of all kinds of difficulties encrusted round its practice.

The organization of the County Court on the other hand is scientific, and its constitution, though perhaps not all that could be wished, is carefully elaborated and supplemented by a code of rules under the revisory care of a committee of judges. The whole country also is divided into circuits, each presided over by a trained judge furnished with a proper staff of subordinate officers.

In view therefore of the fact that the County Courts form a scientifically organized system of local courts they would form an admirable basis upon which to construct a better system of provincial justice of a higher class. This might be carried out by the amalgamation of the County Court system with that of the Quarter Sessions throughout the country, exclusive however of London.

The sittings at the Quarter Sessions towns might form those centres at which (adopting a suggestion of Judge Chalmers) important causes could be tried, and to which the judge would have power to adjourn cases from the smaller courts in the circuit.

In the larger centres the sittings of the County Court might be altered to quarterly and half-quarterly instead of monthly. These quarterly sittings, after the Crown causes had been dealt with,

would naturally be used for hearing the weightier cases, when the presence of counsel could be utilized for the civil business. The juries empanelled for the Crown side would be available also for the civil causes. The half-quarterly sittings might be used for the smaller cases. After weeding out those courts of which the trifling amount of business or whose proximity to a large town makes them needless, the time of the judge might be occupied between the quarterly and half-quarterly sittings at his large centres in going the round of the smaller courts on his circuit.

With an extended jurisdiction the quarterly sittings would afford a stream of civil work to the sessions bar, which no doubt would be looked for as naturally as are the criminal briefs under present conditions.

Great advantage would be obtained by making the Quarter Sessions the Crown side of the County Court in providing all rural Quarter Sessions with an experienced lawyer as judge. It is difficult to believe that anyone whose opinion is worth regarding can be satisfied that the heavy criminal jurisdiction of Quarter Sessions should be so extensively placed in the hands of laymen, whilst the legal knowledge of the Court is reposed in one of its subordinate officials. In fact the absence of lawyers from the bench of rural Quarter Sessions would appear to be really an essential violation of their constitution, since the 34 Ed. 3, c. 1 [1], provides that 'in every county of England shall be assigned for the keeping of the peace one lord and with him 3 or 4 of the most worthy of the county *with some learned in the law*, and they shall have power ..... to hear and determine at the King's suit all manner of felonies and trespasses done in the said county according to the laws and customs thereof.' This provision for a legal element on the bench apparently for a long period has been assumed to be fulfilled by the appointment of a barrister or solicitor as clerk of the court.

Furthermore criminal work as distinct from civil would be an advantage to the County Court judge. Whilst giving variety to his duties, it is acknowledged to have advantage in a judge's training; the important character of Quarter Sessions would also give increased dignity to his judicial position.

Of course the amalgamation of the two systems need not be so carried out as to act oppressively to the recorders at present holding office. Whilst the rural Quarter Sessions could be transferred forthwith, the urban benches might only come under the urisdiction of the County Court as the offices become vacant.

[1] By this statute Lord Holt stated Justices of the Peace to have been made complete judges. *Harcourt* v. *Fox*, 1 Show 528; Archbold's Q. S. Prac. p. 13.

The salaries for the recorderships are generally small, and it rarely happens that more than one is held by the same person. Their loss to the bar would therefore be more than compensated for by the increased value of the judgeships.

Economy might be subserved and the symmetry of our system increased by an amalgamation of some of the subordinate offices. In all centres large enough to make it feasible the registrar of the County Court should be a solicitor debarred from practice and paid a definite salary exclusive of the salaries of his staff. Provision for this indeed is made by the County Court Act, 1888.

Judge Chalmers has pointed out[1] with his usual force and clearness the evils attendant on the present arrangement. This office might easily be made independent in every town of considerable size, by making it part of the duties to act as high bailiff, district registrar of the High Court, and also as Clerk of the Peace in those centres in which this officer is not clerk to the County Council.

Under the present system the amount of salary capable of being drawn by a registrar holding several offices is out of proportion to the salary paid to the judge. Without prejudice of course to the present officials all these offices therefore should be amalgamated as the duty of a registrar paid a fixed stipend and prohibited from practising. A considerable amount could thus be saved upon the present salaries, and the surplus received by the Treasury might contribute towards an increased income for the judge. As most circuits contain at least one fairly large centre the required amount might possibly be saved within each circuit.

With registrars prohibited from practising no difficulty should be felt in extending the principle initiated by the last County Court Act in affording them quasi-judicial powers. Mr. Cautherley's suggestions[2] upon this point are well worthy of consideration, and with proper appointments no reason should exist for not allowing a purely official registrar compulsory jurisdiction to hear defended cases up to £2 and by consent to £5.

However this may be there exists one branch of County Court jurisdiction whose transfer to the registrar is a real necessity for any decided improvement. I refer to the hearing of judgment summonses in large centres. This work, which consists in hearing proof of means, demands but little judicial capacity, whilst the whole surroundings on judgment summons days are calculated to lower the dignity of the Court and spoil the temper of the judge. The great majority of orders are only for monthly sums varying from 3*s.* to 10*s.*, and in most cases an order for commitment is granted with subsequent payment by the debtor. The few cases,

[1] Law Quarterly Review, vol. iii. p. 8. [2] Ibid., vol. vii. p. 346.

however, in which orders for the payment of large amounts are asked, or vindictive imprisonment is desired, might still be reserved for the judge personally. A method of appeal to the judge in special cases might also be formulated. In small courts the judgment summonses are unimportant and only occupy a short time at the end of the sitting.

The mere debt-collecting machinery of which the judgment summons is so important a part would thus be confined still more to its proper region, the registry, whilst the Court itself would be swept clear of the motley herd of knaves and beggars from which so many of the judges turn away with loathing. In addition to the removal of a duty both trumpery and nauseating it would also result in a great saving of judicial time, leaving the judges at liberty for the increased labour of an extended jurisdiction.

A most important point for consideration in any rearrangement of the County Court is an extension of jurisdiction. This is a matter of some difficulty and has been the point upon which critics have differed the most. No advantage it seems to me can accrue from the attempted transmutation of the High Court into County Courts, or vice versâ. A district court could not be a High Court in a true sense whilst actions were liable to removal to courts of first instance with higher rank. Practitioners almost unanimously agree that powerful courts concerned only with the trial of causes of considerable magnitude are a necessity. Courts also are required where the interests of cases of less importance will not be altogether overshadowed by those of the larger ones. The effect of breaking down the distinction in the way Mr. Pitt-Lewis suggested would be that the County Court, wanting in proper compulsory jurisdiction, would be left still more to occupy the undignified position of 'devil' to the High Court.

As long as the distinction between higher and lower courts does exist the line of demarkation must of necessity be arbitrary. The true principle would seem to be a relationship somewhat similar to that established between the Admiralty jurisdiction of the County Court and that of the High Court—that all causes within the pecuniary limit of the County Court must be brought there and nowhere else, each court thus confining itself to a definite section of work that the law apportions to it. In all probability the limit of jurisdiction in common law matters would be conveniently fixed at an amount that Admiralty experience has already proved expedient, namely, £300. This limit receives high sanction also from the fact that for claims under £300 in the High Court the expenses are disproportionate, and extra costs sweep away too large a part of the gain.

Instead, however, of its present unscientific construction, giving only piecemeal authority, a most necessary improvement is that the jurisdiction of the County Court shall be so framed as to embrace all actions, or matters at law, or equity, provided that the value of the subject-matter lies within its pecuniary limit. Any-one interested in studying its queer anomalies of jurisdiction will find some of them antithetically tabulated in Judge Chalmers' article in the third volume of the LAW QUARTERLY REVIEW, p. 4.

On principle, indeed, as the learned judge just mentioned points out, no reason can be given why a judge possessing important Admiralty or bankruptcy jurisdiction should not be able to hear an action for seduction or breach of promise where small damages are claimed. But apart from an aesthetic desire for harmony of design, the actual effect in practice of these excisions is, not only that the time of the powerful judges of the High Court is unduly wasted by small actions of this class, but that cruel wrongs have to go unpunished through fear of the heavy expense of the High Court.

In this inequality of jurisdiction the equity side of the County Court is worse than the common law side, its authority being confined to eight classes of equitable claims. Whilst it may grant administration of an estate up to £500, it may not hear an action for the removal of fraudulent trustees, however small the fund. Many examples might be given, not merely of discrepancy, but of real difficulty in practice by the present artificial construction of the basis of jurisdiction.

Another important matter for consideration in any systematic revision of the County Court is the question of an increased salary for the judges. The present stipend was fixed at a time when the professed object of the County Court was to hear petty cases, and though this view has been long discarded, and the work augmented in volume as well as increased in difficulty and importance, the salary has remained almost stationary. Even now it is little more than that of a chief clerk, and no more than that received by a master, in the High Court. This of course has been often pointed out before and no doubt will be often pointed out again, before the torpid conscience of the ruling powers is awakened.

With the bestowal of increased jurisdiction and the symmetrical organization both civil and criminal here suggested, the salaries of the County Court judges should be made to bear about such a proportion to those of the High Court as the work of the Quarter Sessions does to the Assizes. Possibly a salary of £3,500 would bear a fair relationship to those of the High Court of £5,000.

The proposed increase moreover need not depend entirely upon

the grudging liberality of the Imperial Treasury. Towards it the Exchequer might receive the saving of salaries afforded by the amalgamation of offices suggested, a contribution from the County Council of each district in which the judge presides over a rural Quarter Sessions and the increased earnings of the County Court on its widened jurisdiction.

The application of some method of summary judgment analogous to O. 14 of the High Court is a very necessary provision for the County Court correlative to any extensive increase of jurisdiction. Default summonses as a substitute are an utter failure. A literal application of O. 14 is objected to on the ground that provision for an appeal to the judge from the registrar would be required, and that it could only be heard when the case would have been disposed of on the merits. The force is taken out of this objection by the fact that generally in the High Court there is no contest before the master or registrar, and appearance is set aside as a matter of course.

Any serious objection, however, would be obviated by adopting the modified form suggested by Judge Chalmers that judgment should be entered unless the defendant filed an affidavit disclosing the whole defence: seven days' allowance for the filing of this affidavit would be ample. The bestowal upon the judge of a summary power to fine and imprison for untruthful affidavits, instead of the cumbrous punishment by indictment for perjury, would soon cure the abuse of this process for purposes of delay.

This affidavit would also satisfy the need, much felt among solicitors, for a statement of defence. The almost entire absence of notice of defence in the County Court acts very unfairly towards plaintiffs in the heavier actions, who are apt to have defences sprung upon them, formed of facts requiring examination before the trial.

The only appanages of the County Court system that do not manifest some evidence of careful supervision are the Court-houses. These in many cases are little short of disgraceful. Whilst the Courts provided for the Assizes are generally handsome buildings erected to show respect for the administration of justice and the convenience of those attending them, the County Court-houses are generally provided with little object of any kind except the saving of expense.

I would suggest that these Court-houses throughout the whole country should be under the supervision of the Rules Committee of the County Court judges, in the same way as the buildings of Poor Law Unions and Lunatic Asylums are under the supervision of the Local Government Board and Lunacy Commissioners.

They might thus be intrusted with power to prescribe the character and minimum requirements, with authority to suspend the sittings of a court where inadequate accommodation is provided. In large towns the County Court judges should have the use of the Assize Courts, thus turning these spacious buildings to more constant service. In large centres also a large room properly fitted should then be provided for the use of the registrar, for the hearing of judgment summonses and other matters to be consigned to his jurisdiction. This would keep the Court-house purified from the squalid herd who so often pollute it under present conditions.

A concession appears prevalent in almost all writings upon the County Court that seems utterly at variance with the ethics of a judicial system. This is that the County Court must be self-supporting. Prima facie there appears no more reason why the court of small suitors should be made to 'earn its own keep' than the High Court. The fundamental principle of a judicial system is that it is the representative of the Crown, administering justice regardless of cost, not an arbitrator paid to settle disputes. The actual fact as regards the County Court is that this principle of jurisprudence is cast aside and the system paid for as a commercial scheme by those who use it, whilst the whole attitude of the Crown towards the suitors is that of a pedlar vending only such justice as the litigants can pay for. This narrow-minded stinginess of the Treasury has injured our judicial system on all sides, regardless of the enormous sums lavishly spent otherwise.

The impending change in the High Court towards simplification of procedure might be fittingly met by a corresponding alteration in the County Court and Quarter Sessions towards elaboration, with a view to assimilate the practice in forms and procedure except so far as the radical differences of each compel distinction. This would be a relief to practitioners, whilst the similar wording of the rules would make available in the County Court the many cases upon the practice of the High Court.

Many suggested improvements well worthy of consideration have come from various sources, amongst others, that for debts over £10 a writ should be substituted for the present summons, and that this should be provided and served by the plaintiff's solicitor, thus reducing the expense of the registrar's staff; that appeals should go direct to the Court of Appeal; that the list of courts should be revised, and the circuits rearranged, whilst the judges should be moved periodically from one circuit to another.

The inevitable dissatisfaction where the power of appointing the judges is vested in one person might be ended by adopting a

suggestion of the Law Times, that the patronage should be vested in a Board. This might be done very simply by transferring it to the High Court Rules Committee of Judges whose constitution would be a guarantee for the merits of the appointees.

The two essential conditions of legal reform are Simplicity and Feasibility, and I think no part of the alteration proposed can justly be objected to on principle; equally no part of it would be difficult of application. The effect of the reorganization suggested would be that the amalgamated Court both in civil and criminal judicature might somewhat approach the level of our present Assizes, whilst the mere debt-collecting part of its work would be carried on with equal facility. The judges would have more time for purely judicial duties, and work of more variety and better class would be conducive to finer judicial dignity and temper. The time of the High Court, at present often wasted by trials for comparatively small amounts, would be saved for causes of more importance, and at the same time the Court would be freed from the present delay and pressure upon its cause lists.

The provision of local courts of high standing, where causes of some magnitude could be dealt with, would confer an immense boon upon the trading community generally. Thus courts of the class suggested, where causes from £50 to £300 could be disposed of without the delay and excessive costs of the High Court, would meet a real need in our judicial system. At almost every assize the cause lists bear a large proportion of causes varying between the above amounts, and it is no remarkable circumstance to see a case being tried, in which the fees paid to two Queen's Counsel and two juniors engaged considerably exceed the value of the subject matter of the action. The bearing of this upon the question of litigation is only too obvious. It must not be forgotten that it is not the interest of either branch of the legal profession that litigation should be stifled by disproportionate expense. The United Chambers of Commerce have more than once adopted a resolution that the County Court should be made the only Court of first instance, and, however impracticable, it embodies a warning that the benefit of the public is too little considered by legal circles, and that in all social systems the cost of purchasing any good must not be out of proportion to the benefit to be gained. Moreover with lower courts of better standing, speedy justice and sound decisions might do much to bring back to the courts those commercial cases, the loss of which is so generally lamented by legal practitioners.

WILLIAM H. OWEN.

INDEMNITY OF EXECUTOR CONTINUING TESTATOR'S BUSINESS.

THE nature and extent of the indemnity to which executors who continue the business of a deceased trader are entitled, is a question which immediately affects at least four classes of persons—the merchant who is about to play the part of testator, and is anxious that his business should be carried on after his death; the person who has been nominated executor, and is considering whether he will undertake the responsibility of carrying on a business for the benefit of others; the persons who are likely to give credit after the testator's death to enable the business to be carried on; and lastly, those persons who under the will of the testator are beneficially entitled to the income or capital of his estate. That is to say, it affects testators, executors, creditors, and beneficiaries. This question is moreover of especial interest to the lawyer, inasmuch as some doubt appears to exist as to what exactly is the law upon this point; while there is no doubt that, whichever view of the existing law is correct, some improvement is desirable.

The average business man is apt to look upon Law with more contempt than it perhaps deserves, but, in this case, it cannot be denied that he is to some extent justified in his view if he finds that an executor, who is directed to continue a business for the benefit of a testator's children, is exposed to such financial peril that few persons of substance (and of sense) would dare accept the post. His disgust will probably not be diminished if he also finds hesitating or conflicting views among lawyers themselves upon the precise legal position of the executor who does undertake such a task. Whether such conflict of opinion can be justified is another matter, but it is believed to exist, and there is no doubt that a large portion of the law which should regulate the disposition of a business after death is still unrevealed.

The precise point for consideration will be best appreciated by stating a supposed case. Suppose a testator to leave an estate worth £20,000, of which £10,000 is employed at his death in a particular business, and to appoint his executor with express authority to continue the business for the benefit of his children,

the whole estate being bequeathed among his children equally, and the shares of the daughters being settled upon the usual trusts. Suppose further that the executor does continue the business (which is then solvent) for some years after the testator's death; that, after a certain number of prosperous years, the business fails and the liabilities exceed the assets by (say) £5,000.

Who is primarily liable to pay this £5,000? The answer to that, as a question of law, is clear. The executor, if he is solvent, is the person primarily liable. In the next place, can the executor who has had to pay the deficiency out of his own pocket, claim to be recouped the amount out of the remaining £10,000 of the testator's estate? That is the question.

On general principles it may seem unjust that the executor who has been working for the benefit of others should not be indemnified by those who, in the years of prosperity, have reaped such benefit. To this it may be answered that the beneficiaries in the case supposed have no voice in the matter, and it is equally hard for them not only to lose all the money invested in the business, but a further amount in respect of liabilities voluntarily incurred by the executor over whom they had no control.

On principles of law there appears to be little ground for the contention that the executor, in respect of the deficiency of £5,000, has any right to indemnity. This right to indemnity should be kept distinct from the primary liability of the executor to the creditors of the business. The ground upon which an executor, who carries on his testator's business, is personally liable to the creditors of that business for all debts incurred after the testator's death seems to be a purely commercial one, and to be founded upon the fact that in this country no individual can carry on a business and at the same time limit his liability in respect of such business, except perhaps by express agreement with each creditor. Whether it might be a good thing if persons in the position of executors might be able to carry on a business upon the credit of a limited fund is another question, by no means free from difficulty, and one to which reference will be made later.

Given then his personal liability to the business creditors, what is his right to indemnity? It seems clear that, as between himself and the beneficiaries personally, no such right can arise, as the part taken by the latter is merely that of passive recipients of the testator's bounty. His only right therefore can be against the estate in his hands, and must be ascertained from the directions in the will. Does this right extend against the whole estate, or is it limited to some specific portion?

Perhaps it is best to at once eliminate from the discussion the

possibility of the testator having used express and unequivocal language authorizing the executor to employ the whole of the estate in carrying on the business. The supposed case of course assumes that no such language is to be found in the will. The real point is, Does an authority to continue a business amount to an authority to employ in the business more than the assets which were actually employed at the testator's death? If it does not, then it would seem that the executor's right to indemnity extends no further. In short, that the executor's indemnity must be measured by his authority.

Let us now turn to the reported cases, and see how the matter has been treated from time to time by various judges. To begin with, it may be stated that the writer is not aware of any direct authority upon the supposed case where the executor is solvent, but it is contended, in opposition to the views believed to be held by some eminent members of the profession, that, whether the preceding discussion of the supposed principles which govern the question is or is not sound, only one conclusion can be drawn from the decisions, and that is, that in the case supposed the executor's claim to be recouped his losses would not be admitted beyond the fund actually employed in the business, or, in the words of Lord Macnaghten in the House of Lords in the case of *Dowse* v. *Gorton*, '91, A. C. p. 190 at p. 207,

'If a testator's business is carried on after his death in accordance with the provisions of the will . . . the indemnity of the executors is only limited by the amount of the assets which the testator has authorized the executors to employ in the business.'

In the supposed case it is contended that the 'assets which the testator has authorized the executor to employ in the business' would be the assets which at the testator's death were actually employed in the business, and this view is, it is submitted, supported by the decisions to which reference is subsequently made.

His statement, therefore, involves two propositions, one that an executor's right of indemnity is limited to the assets employed in the business and does not therefore extend to the whole estate, the other that it is not further limited, as was contended in that case, to that portion of the assets which may have come into existence or changed its form since the testator's death by carrying on the business. The latter contention, which was rejected by the House of Lords, is, to say the least of it, difficult to follow, and suggests a line of cleavage which is purely artificial.

The first proposition however seems to be a complete answer to the question, What is the extent of the executor's right to indemnity?

and it remains to be seen whether Lord Macnaghten's statement of the law is supported by earlier decisions.

The leading authority on the question is the judgment of Lord Eldon, in the case of *ex parte Garland*, (1804) 10 Ves. 110, 7 R. R. 352. Here the testator by his will directed his wife (whom he appointed executrix with other executors) to carry on his trade for the benefit of herself and children. He also provided that an inventory and valuation should be made of the stock of the business, that a sum of £600 should be paid to his wife to enable her to carry on the business, and that his wife should give to the other executors promissory notes for the £600 and the amount of the valuation. All this was done.

Two years afterwards the wife became bankrupt, being indebted (in addition to the business creditors) to the other executors in respect of the two promissory notes for the £600 advanced and £1,351 5*s*. the amount of the valuation, and also in respect of a further sum of £768 12*s*. 4*d*. which they had advanced to her out of the testator's general assets. One of the other executors having died, the survivor proved in the bankruptcy for these three sums. The assignees on behalf of the other creditors claimed to have the proofs expunged, and that it might be declared 'that the whole of the personal estate of the testator is liable to all the debts contracted by the bankrupt in carrying on the trades of a miller and a farmer under the directions of the will.' Lord Eldon refused to make this declaration, and, although he ordered the proofs for £600 and £1,351 5*s*. to be postponed until after payment of all other creditors of the bankrupt, he allowed the proof for £768 12*s*. 4*d*. to stand.

Now, although the facts of this case varied slightly from the facts of the supposed case, yet Lord Eldon's decision and the grounds upon which it was based appear to be of universal application. In order to thoroughly appreciate the powerful judgment of Lord Eldon it is necessary to analyze the main points raised in argument.

It was argued (i) that an executor by carrying on the testator's trade renders himself personally liable for all the debts contracted in that trade; (ii) that in respect of such liability he is entitled to be indemnified out of the whole estate of the testator because he is merely carrying out the testator's directions; (iii) that the business creditors must have the same right, at least by circuity to the same extent.

The Lord Chancellor deals with all these points, prefacing his answer to these arguments by saying—'The question really goes to this; whether this Court is to hold that where a testator directs a trade to be carried on, and, without limitation, all the other purposes of his will are to stand still, or all the administration under it, to be

so checked, that every person taking is in effect to become a security in proportion to the property he takes, and to the extent of all time, for the trade which the testator has directed to be carried on. The inconvenience would be intolerable.'

Thus in the first place he considers that the indemnity of executors in such a case ought not to extend beyond the assets in the business on the ground of inconvenience, and, as he says at the end of his judgment, 'it is impossible to hold that the trade is to be carried on perhaps for a century, and at the end of that time the creditors dealing with that trade are, merely because it is directed by the will to be carried on, to pursue the general assets, distributed perhaps to fifty families.' Certainly if this supposed right of indemnity were carried to its logical conclusion every penny received by every beneficiary, whether by way of profits as income, or by way of capital as his specific share, might be called back by the executor (or through him by his creditors) to pay the debts of the business.

Lord Eldon then turns to consider the hardship on the executor. 'On the other hand the case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property, and may be proceeded against as a bankrupt, though he is but a trustee. But'—and this is a most important reason—'he places himself in that situation by his own choice; judging for himself whether it is fit and safe to enter into that situation and contract that sort of responsibility.'

The Lord Chancellor next proceeds to examine the position and rights of the business creditors:—

'As to creditors subsequent to the death of the testator, in the first place, they may determine whether they will be creditors. Next, it is admitted, they have the whole fund that is embarked in the trade; and in addition they have the personal responsibility of the individual with whom they deal; the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate, embarked in the trade.'

The precise nature of this right or lien has been expounded by subsequent decisions, and the general result of them is to the effect that the business creditors have no direct claim upon any portion of the testator's assets, but only against the executor personally. If, however, the executor has a right by way of indemnity against any portion of the testator's estate to be repaid any debts which he has incurred in carrying on the trade, the creditors are entitled to the benefit of such right, and so indirectly have a claim upon the assets, and the right of the creditors appears to be co-terminous with that of the executor.

Thus in *Re Johnson, Shearman* v. *Robinson*, (1880) 15 Ch. D. 548, Jessel M.R. said (p. 552):—

'I understand the doctrine to be this, that where a trustee is authorized by a testator . . . to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say—"I had the personal liability of the man I trusted, and I have also the right to be put in his place against the assets; that is I have a right to the benefit of the indemnity or lien which he has against the assets devoted to the purposes of the trade." The first right is his general right by contract, because he trusted the trustee or executor; he has a personal right to sue him and to get judgment, and to make him a bankrupt. The second right is a mere corollary to those numerous cases in equity in which persons are allowed to follow trust assets.'

The process of reasoning in *ex parte Garland* seems therefore to have been something of this kind. If the executrix had been solvent she would have been entitled to be indemnified in respect of the business debts to the extent of the amount expressly authorized to be embarked in the trade, that is of £600, together with the further sum of £1,351 5*s*., which was impliedly so authorized, and which represented the amount of the assets found by valuation to have been at the date of the death actually employed in the business but no further. Her creditors stand in the same but no better position, and therefore have no lien against any other portion of the assets. The case therefore seems to establish the proposition first stated, namely that executors are entitled to be indemnified to the extent of the assets which the testator has authorized to be employed in the business but no further; and also that a mere authority to continue a business implies an authority to employ the assets in the business, but is not of itself, without express words to the contrary, an authority to employ any portion of the estate which is outside the business.

Speaking broadly, the question comes to this. What was the intention of the testator? What authority did he intend to give to the executors? Did he intend to authorize his executors to render liable the whole of his estate for the payment of debts incurred subsequently to his death? Did he in fact intend to authorize the investment of his whole estate in the business? Or did he intend to do no more than allow his capital in the business to be continued therein as long as possible, as being a more profitable investment for the benefit of his legatees than if the business were wound up and sold, perhaps at a forced price, and the proceeds of the sale invested in trust investments at a low rate of interest.

It is submitted that the effect of the decision in *ex parte Garland*

is that, in the absence of express provision to the contrary, the law presumes that the testator by authorizing the continuance of his business does not intend to involve his whole estate in liability.

This very point has in fact been expressly decided, and it has been held that the mere fact that a testator has authorized his business to be continued is not of itself evidence of his intention to authorize the investment in such business of any portion of his estate which is not already in the business.

This was the case of *M'Neillie* v. *Acton*, (1853) 4 De G. M. & G. 744, before the Lords Justices Knight-Bruce and Turner, in which the testator's widow, who carried on his business pursuant to directions in the will, mortgaged some freehold property, which was part of the testator's general estate and was unconnected with the business, in order to secure an advance to meet some liabilities which she had incurred to the business creditors. It was argued that a direction in a will to carry on a trade was equivalent to a charge of debts on the real estate, and that the debts incurred in the business (after the death) were on the same footing as the testator's own debts. Lord Justice Turner deals with this somewhat startling argument in detail. In rejecting it his conclusion is singularly like that of Lord Eldon in *ex parte Garland*. He says:—

'If the debt contracted in the course of the trade, or the right of the executors to be indemnified in respect of the expense incurred in carrying on the trade, is to be a charge on the whole of the estate of the testator, the necessary consequence would be that no part of the estate could in the meantime be applied in payment of any of the legacies given by the will, and that all administration of the testator's estate must stop until the period when the trade is wound up.'

In addition to the authority of Lord Eldon, and the Lords Justices Knight-Bruce and Turner, we have the high authority of Lord Blackburn in the Scotch case before the House of Lords of *Fraser* v. *Murdoch*, (1881) 6 App. Cas. 855, which turned upon the right of the trustees of a testatrix to be indemnified in respect of a liability incurred by them on account of some unlimited bank shares which had belonged to the testatrix. In his judgment Lord Blackburn carefully examines the case of *ex parte Garland*, and concludes thus (p. 875):—

'I think it clearly must have been the Lord Chancellor's opinion that the trustee who, of his own choice, placed himself in the situation of incurring liability for a trade which the framer of the trust directed to be carried on with a particular part of his assets, had no right to come for indemnity upon the rest of the assets.'

The actual decision in *Fraser* v. *Murdoch* does, it is true, appear to create some difficulties in the way of the contention which has been raised, but the facts are widely distinguishable from the supposed case. Even assuming, as Lord Watson apparently does, that the liability for calls was not a contingent liability of the testatrix at the date of her death, yet it must be remembered that the trustees, as mere holders of such shares, had practically no control over the creation of subsequent liabilities, and did not, as in the supposed case, personally incur fresh debts by fresh contracts into which they themselves had entered. More serious principles, however, underlie the decision, especially as to how far trustees can retain as permanent investments securities involving unlimited liability, and then claim to be indemnified out of the trust funds in their hands when such investments may have been continued, either without the knowledge, or perhaps even against the expressed wishes of the beneficiaries.

We have now discussed the nature and extent of the right of indemnity of an executor, who is carrying on the testator's business in accordance with his directions, from two points of view, first, on principle, that is to say what, upon general principles of law, we should expect the law upon this particular point to be, secondly, what, upon a study of decided cases, we find it is. The third question which remains for consideration is whether any improvement upon the existing law can be suggested. Before doing so it may be advisable to sum up the main conclusions as to what, according to the view above stated, is the existing law.

(1) The executor is personally liable to the business creditors to the whole extent of his fortune.

(2) His right to indemnity is limited to the fund which the testator has authorized him to employ in the business.

(3) A mere direction to continue a business impliedly authorizes the employment in the business of so much of the testator's estate as was at his death actually employed in the business and no more.

The only improvement, to meet the fairness of the case, which the writer can suggest is, not that the executor's right of indemnity should be extended but that his personal liability should be limited by the amount which the testator has authorized him to employ in the business. With proper publicity the business creditors could not complain. Such an alteration in the existing law would involve the necessity of an express legislative enactment, and would introduce into this country the principle of the limited liability of an individual as opposed to that of a joint stock company incorporated under the Companies Acts.

It might be sufficient if an executor who desired to so limit his

liability placed 'executor' after his name and was registered with reference to the will under which he purported to act. The creditors of the business would then be thrown back on the terms of the will and could extract for themselves what they thought his authority was. Perhaps it would be simpler if the executor registered the amount by which he desired his liability should be limited. Whatever might be the precise method which the Legislature should think fit to adopt, it certainly seems fair that his liability should be so limited.

Testators may perhaps also be reminded that even though such an alteration in the law would remove any objection on the ground of risk to such an executorship being undertaken, yet mere limitation of liability is not in itself an inducement, and that, if the best men are to be entrusted with the anxious and responsible work of conducting a business for the benefit of others, their time, labour and special knowledge should be rewarded by something more substantial than the blessings of a dead friend. In America, by the law of New York, executors are allowed a percentage on all moneys received and paid by them, and this law seems to be based upon sound commercial principles. It certainly would not be unreasonable if every will in this country contained a similar provision even if a similar law was not adopted; but at any rate it seems obvious that if a testator wishes his executor not only to give his time and attention, but also to incur personal risk, he ought to expressly provide for his remuneration, if not for his indemnity.

Before concluding these remarks some reference should be made to the case of a deceased partner. The question here is similar to that in the case of a sole trader, and the answer depends upon similar principles. The question is, Does the authority of the testator to continue his share in the partnership business entitle the executor to be indemnified out of the whole estate against all partnership liabilities to which he, as executor[1], may become personally liable? This question has been answered indirectly by the case of *ex parte Richardson, re Hodson*, (1818) 3 Mad. 138, the headnote of which sufficiently states the decision, and is as follows:—

'Testator disposes of his property by his will, and directs a trade, in which he was concerned, to be carried on after his death. *Held* that only the testator's capital in the trade was liable to the creditors of the trade, who became such after the testator's death, and that they had no further claim upon his assets.'

This decision was followed by that great commercial lawyer,

[1] It is not clear in what cases exactly the executor of a deceased partner does incur personal liability. Compare *Holme* v. *Hammond*, L. R. 7 Ex. 218, with *Wightman* v. *Townroe*, 1 M. & S. 412.

Mr. Justice Story, in the leading American case of *Burwell* v. *Mandeville's Executor*, (1844) 2 How, 560, where the question was whether the general assets of a deceased partner were liable for the payment of a debt contracted by the firm after his death, on the ground that the testator had authorized the continuance of his share in the business. After reviewing the English cases the learned judge says:—

'Nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion.'

The conclusion, therefore, to which one is irresistibly drawn is that, neither in the case of sole trader nor in that of a partner, does a mere authority by a testator to his executor to continue his business or his share in a business involve in liability to the trade debts more than the amount of assets actually so employed by the testator at the date of his death.

A. Turnour Murray.

OUR INDIAN PROTECTORATE[1].

IN this interesting book Mr. Tupper undertakes, not unsuccessfully, to define and explain scientifically what he has termed Indian Political Law, by which is meant the rules and principles governing the relations between the Native States of India and the supreme British Government. He traces the rise and gradual development of the system which has been thus organized; he shows how it has been formed originally by the inevitable pressure of needs and circumstances, by wars, annexations, and treaties, and latterly by the set purpose of those vigorous rulers who laid the foundations and built up the stages of our dominion in India, by acts that were deliberately ratified and approved by the English nation. And to the sovereignty that has been thus established over a great number of dependent States within the geographical boundaries of India Mr. Tupper gives the name which is his book's title, 'Our Indian Protectorate.'

The growth of a political organization, as of a church or creed, is in its beginning spontaneous; it is subsequently moulded and modified by the environment. But sooner or later, whenever the period of maturity and predominance is reached, comes a time when the religion must be referred back to a philosophy, must be provided with a dogmatic basis, and when the political creation must be adjusted to a definite and defensible theory. The theory to which Mr. Tupper adjusts the very diverse and miscellaneous relations now existing between the British power and the indigenous principalities in India is the Divisibility of Sovereignty, according to which the rights and attributes of a completely independent State may be distributed, in varying degrees and proportions, among a number of rulers, none of whom, except only the supreme government, can be strictly termed independent. In this view he avowedly follows the teaching of the late Sir Henry Maine, to whom above all men the British Government is indebted for luminous generalizations upon the very confused materials of Anglo-Indian history, and for juristic classifications of the untutored but effective methods used by those who from time to time knitted together the provinces and principalities that now constitute our Indian empire. He it is who has shaped into symmetrical ends the rough-hewn work of

[1] Our Indian Protectorate: an introduction to the study of the relations between the British Government and its Indian feudatories. By Charles Lewis Tupper, B. C. S. London: Longmans, Green & Co. 1893. La. 8vo. xvi and 426 pp.

our early administrators. Mr. Tupper, indeed, speaks of him with something like enthusiasm—'The course of modern nations amid archaic societies and states of a type no longer seen in Western Europe may often be dark and dubious. But the theory of the divisibility of sovereignty, not indeed invented but applied by Sir Henry Maine, stands out, as it were, on an eminence crowning the whole expanse before us, and, like a glowing core of light, immensely facilitates a straight and safe voyage over the wide and confused sea of Indian politics.'

What, then, is the Indian Protectorate, and how did it actually grow up in the course of the last hundred and twenty years or thereabouts? The first principle upon which it rests is 'the maintenance of the supremacy of the paramount power, whose guardianship is the security of the peace of the whole Indian continent, the preservation of the autonomy of the feudatory states, and the assurance to the population of those states that they shall enjoy freedom from gross misrule. The feudatory states have no power of confederacy, their territories can only be increased through the British Government; the invasion of one state by the forces of another will be a breach of allegiance; the states are bound to act in subordinate cooperation with the British Government, and to acknowledge its supremacy.' Such being, very briefly, a definition of our Protectorate, we can find in this book a rapid and comprehensive retrospect of the steps and methods by which it was gradually built up. It was in the middle of the eighteenth century, when French and English were confronting and competing with each other in South India, that the native powers, having discovered the decisive superiority of European arms and discipline, imprudently called in these foreign auxiliaries to help them, on one side or another, in their contests over the spoils of the Moghul empire. The practice of lending military contingents to the chiefs whom it was desirable to support soon developed a system of subsidiary alliances, whereby certain States who needed assistance or protection agreed to bear the cost of large bodies of troops, to be raised and officered by the East India Company, to whom the States paid large subsidies, or even ceded territory as an equivalent for money. There were also a number of petty chiefships which ranged themselves under the British aegis in order to escape destruction or dismemberment in the scuffling confusion that went on, or whom we took under our guardianship that they might become buffers or breakwaters between our own possessions and those of powerful and predatory rulers like the Mysore sultans, the Marathas, or Ranjít Singh of Lahore. And latterly, as the superiority of our own dominion became consolidated, it became a

cardinal point of our policy to bring all the native States, whether allies or rivals, within the system of subsidiary treaties, assuming for ourselves the duty of protecting them from external attack and the management of their foreign relations, insisting on their disarmament, and imposing upon them, in short, all the terms and conditions of our Protectorate. These aims and objects were first openly adopted and proclaimed by Lord Wellesley, who foresaw, at the opening of the present century, the necessity of bringing every State in India under one imperial control; they were carried forward by Lord Hastings; and the edifice was crowned by Lord Dalhousie. The secret of their success lies in the fact that one supreme authority has always been needed to keep the peace of India; or, as Mr. Tupper puts it, in the explanation 'that perhaps the old-world theory was right after all, and that the universal or general dominion of one State is the right principle upon which to base the relations between a number of States where one of them far excels the rest in its degree of civilization.'

During all this time, it will be remembered, the expansion of our own territories was going on; we were adding province to province by conquest and diplomacy. 'Political influence has advanced side by side with actual acquisition of territory, and acquisition of territory has strengthened political influence'; but it is principally with the nature and actual conditions of British sovereignty as it is exercised over the protected States that this volume is concerned. Of the events and transactions which brought about the present situation, the two chapters on the early and the later growth of the Protectorate give a compendious historical review. A subsequent chapter, which will interest the student of political theories, deals with the now obsolete doctrine of Lapse, and explains how it was superseded by the formal recognition, in Lord Canning's Governor-Generalship, of the right of ruling chiefs, on the failure of heirs natural, to adopt successors according to the laws or customs of their religion or their race. It is admitted on all sides that no Indian principality can pass to an adopted heir without the assent and confirmation of the paramount sovereign; but Lord Dalhousie claimed and exercised the right of deciding on public grounds, in each particular case, whether this assent should be given or withheld, and if he withheld it the State passed by lapse to the British Government. Nothing, thought Lord Dalhousie, could be more fortunate for the subjects of a native dynasty than its extinction by this kind of political euthanasia. Lord Canning, on the other hand, having openly declared it to be the desire of Her Majesty's Government to perpetuate in undiminished power and prosperity the houses of native princes and chiefs, assured them beforehand

that all adoptions according to law and usage would certainly be recognised. The extent to which confidence has been restored by this edict is shown by the curious fact that, since its promulgation, a childless ruler very rarely adopts in his own lifetime. An heir presumptive, who knows that he is to succeed and who may possibly grow impatient if his inheritance is delayed, is for various obscure reasons not the kind of person whom an Oriental ruler cares to see idling about his palace, so that a politic chief often prefers leaving the duty of nominating a successor to his widows, who know his mind, and have every reason for wishing him long life.

In his chapter on 'Early Indian ideas of Sovereignty' Mr. Tupper seeks to trace the gradual transformation of the tribal chieftain into the territorial despot. He shows that the notion of territorial sovereignty, of personal despotic rule over a distinct area, was very little understood in early Indian times or among the primitive kingships, that the system of direct administration of certain provinces by a central power through its officials was mainly introduced by the Moghuls, and that so far as British government is framed on that model, it has continued or imitated the institutions of the Moghul empire. For many years after the conquest or cession of the northern provinces, especially in the districts about Agra, Delhi, and Allahabad, where the Moghul rule had been strongest, the principal administrative change that followed the transfer of territory was the substitution, in the higher official posts, of Englishmen for natives. But the Moghuls had taken many leaves out of the book of their Hindu predecessors, and in the outlying districts or chiefships they interfered very slightly with local usage or privilege. Mr. Tupper devotes a chapter to describing, with much care and research, the Sovereignty of the Moghuls; proceeding afterward to Feudalism and Feudal tendencies in India, with the general object of thoroughly elucidating the political state of India in the periods antecedent to the establishment of British supremacy, and of convincing his readers that the British system of administration is not a new-fangled arbitrary invention, but is largely derived, with adaptations and immense improvement, from the ideas, institutions, and governmental devices of our precursors in various parts of the country.

As a contribution to the study of the correlation and development of political forms, these chapters are undoubtedly valuable. The needs and circumstances of mankind in the earlier stages of striving against disorder and insecurity produce everywhere similar expedients, having more or less resemblance to each other; so that we need not be surprised at the discovery that at certain periods and in certain parts of India there have existed, for example, what

Mr. Tupper rightly calls feudalising tendencies. The practice of granting lands to be held on condition of service, which was very common in India, presents some analogies with the fiefs of mediaeval Europe; and there are some other tenures which have at least a curious likeness to the tenancies and feudal jurisdictions of the West. As Mr. Tupper says that he has traced nothing in India that is truly analogous to the *comitatus*, 'the chosen band of trusted dependents immediately surrounding the chief or king,' we may observe that he will find almost exactly what he has been seeking in the annals of the foundation of some of the minor Rajpút States. The cesses levied by a Hindu lord from his villages remind one of the 'Droits Seigneuriaux' of France, as he shows by some remarkable instances; and we may complete the comparison by adding that on certain estates of Central India, as latterly in France, the whole income from the cultivators seems to have consisted, not of rents, but of 'rights' or dues. A great Indian *Sardár* held powers of life and death within his domain, like a 'grand seigneur' of the seventeenth century in some outlying French province; and he claimed the wastes in a sense that may possibly justify some reference to an English manor. But we question whether any scientific or solid use can be made out of these coincidences, which prove mainly that in troubled times men resorted to similar devices everywhere for supplying the necessity of mutual interdependence, for purchasing the protection of powerful neighbours, and for dividing the produce of the soil. The broad currents of social and political evolution in Asia and in Western Europe took quite different directions and ran in such widely divergent channels that it is not worth while to lay any critical stress upon the obvious contrasts and dissimilarities which interfere with the scientific use of these historical parallels.

Let us take, for example, the following passage from Mr. Tupper's chapter on Feudal Tendencies:

'In India almost exactly the converse has happened of what happened in Gaul. In what is now France the semi-barbarous German tribesmen overmastered the mature, though failing, civilization of Romanised Gaul. In India the nature and strong civilization of our own country has acquired supremacy over a vast assemblage of semi-civilized states and races and tribes. Looking to Western Europe as a whole, and to India as a whole, our situation in India is as though the old Roman empire risen from the dead had conquered the broken empire of Charlemagne.'

Here the range of historic survey is sweeping, picturesque, and suggestive. Nevertheless we must submit to Mr. Tupper the criticism that as no real parallel between the two periods is

possible, the light which his comparison throws upon these two great fields of history is necessarily broken, confusing, and ineffectual. If India in the eighteenth century had in any essential respect resembled the broken empire of Charlemagne, it would never have been conquered by the English; nor can the irruption of barbarous tribes into Romanised Gaul be presented as a converse to the acquisition of India by the English. When Mr. Tupper points, as he does frequently, to certain strong resemblances between the Roman provincial system and the British administration of India, he is on much safer ground; and he might even go on to predict that the British empire, like the Roman empire, may have its term, though it will not be pulled down by barbarous tribes. It may also be an interesting speculation to consider whether the struggle over the prostrate Moghul empire might not eventually have evolved some true nationalities in India, as the nations formed themselves out of the jarring confusion of the dark ages in Europe, if the European had not just then appeared upon the arena.

There appears, moreover, to be some ground for remarking that in some of these latter chapters, although they are decidedly instructive and full of valuable matter, Mr. Tupper has travelled somewhat wide of his special subject, the Indian Protectorate, and has embarked upon the open sea of Indian politics, considered historically and prospectively. His rapid sketch of the former state of the country at large under Mahommedan and other governments is drawn mainly, we apprehend, for the purpose of comparing it with his picture, in the following chapter, of Native Rule under the Protectorate, and of explaining the degree of interference, and the manner in which it is exercised, by the British Government in Protected States. The task of judicious interposition is of course both difficult and delicate, for what shocks Englishmen does not always shock Hindus; and the British official and the ruling chief have to watch two different barometers of public opinion both in England and among the State's people. To kill a cow is in many States the worst form of sacrilege, punishable by death, just as in Voltaire's time men were judicially executed in France for insulting the Mass; but on the other hand to hang the cowkiller offends English susceptibilities. All these anachronisms and anomalies have to be gradually corrected up to a good working standard of average morality. The chapter on the Constitutional Position of Native States is very well indeed worth reading by all who desire to understand these rather intricate relations; the positive law on the subject is clearly stated, nor does Mr. Tupper fall into the mistake of attempting to define the undefinable, or of endeavouring to be inconveniently precise over

the mysteries of statecraft. With his ideas regarding administrative decentralisation one may agree cordially; although the ulterior problem of Imperial Federation is as yet very far from practical solution. The book bears, on the whole, ample evidence of the author's experience and ability; it is full of valuable information stated with clearness and precision, and it contains many very suggestive observations on the history and politics of our Indian empire.

A. C. LYALL.

THE LAST DAYS OF BONDAGE IN ENGLAND.

SIR THOMAS SMITH, writing towards the close of the sixteenth century, is commonly quoted as an authority that the class of bondmen had by that time well-nigh disappeared from England. There seems no reason to doubt the truth of his statement. He had every opportunity of acquaintance with the facts, for he held high official rank, and probably wrote with a knowledge of the returns of the commissioners appointed for manumissions on Crown lands in 1574[1], 1575[2] and 1579[3]. What is not generally realized is that the emancipating movement, which had been steadily proceeding for generations under the convergent influences of the Royal Courts of Justice, the privileges of the chartered towns and the exhortations of the secular clergy, had by no means attained its goal as late as the middle of the century, and that the legal disabilities anciently attaching to the status still survived and were sometimes rigorously enforced. The preambles of acts of manumission had long bombarded bondage with fine sentiments in language reminding us of Rousseau or the Convention[4]. But it was not till after the accession of Elizabeth that public opinion vigorously set itself against the institution. It is true that writers like Fitzherbert had deplored its continuance as unchristian. But so far was this from being the general sentiment of the manorial lords that Fitzherbert himself records a movement in the contrary direction. 'There be many freemen taken as bondmen, and their landes and goods taken fro them, so that they shall nat be able to sue for remedy to proue themselfe fre of blode[5].' So powerful a minister as Cromwell, requesting Henry Earl of Arundel, at the instance of Sir Edward Walsingham, to manumit a bondman, met with a refusal, not upon any personal grounds, but for the proprietorial reason that the enfranchisement of a bondman 'would

[1] Rymer, Foed. xv. p. 731.
[2] MS. R. O. Pat. Rolls 17 Eliz. pt. 2, membrane 39; Notes and Queries, 4th series, xi. 298.
[3] MS. R. O. Exch. Q. R. Anc. Misc. 821–37; Notes and Queries, 5th series, i. 118.
[4] 'Cum ab initio omnes homines natura liberos creavit, et postea jus gentium quosdam sub jugo servitutis constituit:' 11 Nov. 1485, Camp. Materials i. 166; Manumission by Henry VII. When the Renaissance had been obscured by the religious movement, the preambles showed the change. 'Well consideringe the same to be acceptable unto Almightie God who in the beginninge made all mankinde free.' Warrant of Elizabeth, Rymer l. s. c.
[5] Surueyenge, ch. 13, ed. 1539.

be to the prejudice of my inheritance for ever[1].' Cromwell, it may be noted, was active in this work, perhaps with hope of redeeming his general unpopularity[2].

The changes of sentiment in the next generation[3] may be ascribed to two influences. Of these the first was the assertion by Protestantism of the right of private judgment, of which the moral liberty of man is the fundamental postulate. There was an obvious incompatibility between the temper which emancipated the mind from submission to a venerable organization and the temper which would retain the person in subjection to the despotism of a master. In the struggle between the rights of property and the reforming spirit the rights of property gave way. The other influence belongs to the same movement. So long as the ancient Church remained surrounded by its proprietorial splendours, so long the institution of bondage was made respectable by the countenance of an authority that commanded deference. It is true that the secular clergy had been solicitous to mitigate its hardships and exhort to its remission. The country clergyman in Chaucer's 'Persone's Tale' censures exactions from bondmen. On the other hand, the dissolution of the monasteries revealed the existence of bondmen in great numbers upon the ecclesiastical lands. The Church was not, so far as I can gather from contemporary literature, charged by her enemies with the oppression of her bondmen. The probabilities are rather that, with the habitual indulgence of great corporations towards their dependents, she rendered them content with their lot[4]. But it must be remembered that a large latitude of tallage was enjoyed by manorial lords over this class. With these wealthy corporations the most important condition of a revenue is that it should be fairly constant in its annual amount. They were, therefore, exempt from the temptations that beset lay lords, who, impoverished by the extravagance of the court or by the personal charges incident to foreign campaigns, were glad to raise money upon occasions of financial dearth by

[1] June 26, 1538; 30 Henry VIII, Gaird, L. & P. XIII. i. 1263.

[2] Ibid. i. 324; Feb. 21, 1538; 29 Hen. VIII. Dr. John London, Warden of New College, Oxford, in answer to a letter from Cromwell, desiring him to manumit certain bondmen on an estate of the college at Colerne, Wilts.

[3] 'This perswasion, I say not of Christians, not to make nor keepe his brother in Christ seruile, bond and vnderling for ever vnto him, as a beast rather than a man, & the humanity which the Christian religion doth teach hath engendred through Realmes (not neere to Turkes and Barbarians) a doubt, a conscience, a scruple to have seruants and bondmen.' Sir Thomas Smith, The Commonwealth of England, ed. 1635, p. 255. Smith wrote about five and forty years after Arundel's letter. The Arundels, it is scarcely necessary to add, were of the Catholic and Conservative party.

[4] In the letters patent to Sir Henry Lee, January 17, 1575, a proviso occurs in case of refusal by the bondmen on the Crown estates to compound for their freedom. In that event Sir Henry is empowered to seize their lands as his own and to turn them out. See p. 348, n. 2, supra.

accepting compositions for manumission [1]. On the other hand, the interests of the secular clergy were strongly with enfranchisement. The mere liability to oppressive exactions, even when tradition was against its practice, must have discouraged industry in England as it does to this day in the East. In the ballad of John de Reeve, the hero is the king's bondman and declares 'Thereof I have good likinge.' But he is anxious that the king should not know of his wealth,

> 'For it might turne me to great greeffe
> Such proud ladds that bear office
> Wold danger a pore man aye [2].'

Unless we are to attribute to the secular clergy a more lively conscience than that of the regulars, it is difficult to avoid the conclusion that their zeal against bondage arose from the perception that freemen were more prosperous than serfs and that a bondman's savings, swept away by a grasping steward, might have furnished forth a freeman's offering to his neighbour and minister.

As an example, probably an extreme one, of the number of bondmen upon the estates of the great religious houses, we may take the survey of Glastonbury Abbey as given by Hearne [3]. The Abbey possessed lands in Somerset, Wilts, Dorset, Gloucestershire, Berks and Devon. No bondmen are mentioned upon the estates in the last three counties, and only one in Dorset. The inference is that the number of those in Somerset is by no means representative of the average proportion of bondmen upon monastic properties. The Glastonbury Abbey Survey is also transcribed in Dugdale [4], but I can find no similar survey elsewhere in his collection, not even at Reading, of which the abbot suffered at the same time as the abbot of Glastonbury. The 'Valor Ecclesiasticus' which Dugdale prints comprises only the rents and payments. Mr. Furnivall states that none of the surveys of the monasteries among the MSS. of the Record Office mentions bondmen [5]. All that we can say is that the mention of them in documents of this period generally conveys the impression that they were not numerous. In the survey of the duke of Buckingham's Gloucestershire lands in 1521 it is said, 'Of bondmen there is a good number, as appears by the court rolls.' It may be that this equivocal statement implies a proportion as large as that upon the Glaston-

[1] See Lord Darcy's Remembrances of the acts of Wolsey, Br. Cal. iv. 5750, p. 2560, as to the impoverishment of the nobility.
[2] Bishop Percy's Ballads and Romances, edited by F. J. Furnivall and J. W. Hales, London, 1868, p. 566.
[3] Hearne's Works, vol. iv (Peter Langtoft, vol. ii), Oxford, 1725.
[4] Monast. Angl. i. 20.
[5] Notes and Queries, 4th ser., xi. 297.

bury Abbey property, where the total summary, as given in Dugdale, is 271 bondmen to 1274 other male tenants[1], or about 21 per cent. But as a rule they are mentioned incidentally, as though numerically unimportant. A letter to Wriothesley as to the manor of Tytchefelde in Hampshire, granted to him after the dissolution of the Abbey for Premonstratensian canons to which it belonged, informs him that he has 'many good and hearty tenants . . . and *some* bondmen whose names shall be registered[2].' Fitzherbert's language, 'Howe be it in some places the bondemen contynue as yet[3],' implies that in most they had disappeared, and this is confirmed, as has been seen, even by the Glastonbury survey itself. I have noted manumissions or mention of bondmen in the following counties in the sixteenth century—Somerset, Dorset, Wilts, Gloucestershire, Hampshire[4], Devon[5], Cornwall[5], Yorkshire (E. R.), also on the duke of Buckingham's property[6], Warwickshire[7] and Rutland[8]. These are chiefly enfranchisements by the Crown. In 1548 Sir Richard Sakevyle, upon his appointment as Chancellor of the Augmentations, was commissioned to 'take order for the manumyssion of villeyns[9].' In Norfolk in 1549 Kett's rebels demanded 'thatt all bondemen may be made ffre[10].'

It has been observed by Sir H. Ellis in his introduction to Domesday that 'there are numerous entries in the Domesday Survey which indicate the villani of that period to have been very different from bondmen[11].' But at the close of the thirteenth century Bracton, Britton and Fleta, servilely copying the Roman jurists, with whom naked slavery was the alternative to liberty, 'nicknamed,' as Professor Vinogradoff has expressed it, villains 'servi[12].' A school of lawyers, however, existed which denied the identification and, as I have elsewhere shown, the law courts refused to follow it in practice. Of this school the surviving

[1] Dugdale's transcript runs: 'Somme total of all the able men beyng allwayes in a rediness to serve the kynge when they shall be called upon mcclxxiiii: Bondemen of blood apperteyning unto the sayde late attainicted monasterye cclxxi: whiche have in a rediness at all tymes when they shal be called upon to serve the kynges highe majestye d. payre of harness.' If this enumerates only ablebodied men, the actual numbers of tenants and bondmen are greater, but the proportion will presumably remain the same.

[2] Gaird, L. & P. XIII. i. 1263. [3] Surueyenge, ch. 13.

[4] 1522, Br. Cal. iii. 2992, manumission; 1536, Gaird, L. & P. xi. 1417 (14), two manumissions.

[5] 1525, Appointment of commissioners of lands, stannaries, tolls of tin, moors and wastes belonging to the duchy of Cornwall in Cornwall and Devon, as well those which were leased to freemen as those held by bondmen. Br. Cal. iv. 1533.

[6] 1533, Gaird, L. & P. vi. 1383 (2), three manumissions.

[7] 1534, Gaird, L. & P. vii. 147 (5), manumission.

[8] 1525, Br. Cal. iv. 1610 (21), manumission. [9] Lem. Cal. i. 10.

[10] Kett's Rebellion in Norfolk, by F. W. Russell: London, 1859, p. 52.

[11] i. p. 80.

[12] Law Quarterly Review, i. 197.

literary representative is 'Le Myrrour des Justices.' Still the term villain came to be frequently used with the degraded connotation [1], more fully expressed by the terms 'pure villain' and 'villain by blood [2].' In the thirteenth century 'consuetudinarius' appears as the equivalent of the older sense of villain [3]. In the sixteenth century the term 'copyholders' prevailed, of which Fitzherbert remarks that it was 'vn nouel terme trouve [4].' Contemporaneously with this change the ancient 'nativus' or 'naif' fell into comparative disuse, the word 'bondman' taking its place. But the sense that an alteration of terminology had been introduced made itself evident by the conjunction with 'villanus' of words of a less ambiguous significance, as in the Hundred Rolls, where the words 'nativus' and 'servus' are usually added to distinguish the kind of villain. In the case of *Burde* v. *The Earl of Bath* (1535) [5] the plaintiffs are described as 'villayns and bondmen regardauntes,' 'bondman to the earl of Bath and villayne regardant to his maner,' 'villaynes and nyeffes regardaunts [6]' and 'bondmen regardaunte.' Conversely, land in villenage was *sometimes* said to be 'in bondagio,' perhaps originally where a customary tenancy was granted to a 'nativus.' In English the words 'in blood' are frequently added to 'bondman' to avoid confusion arising from the looseness of the terminology which had set in with the Romanizing lawyers.

As to the legal incidents of bondage there is little room for question. 'In Doomsday Book slaves, though classed as belonging to manors, are never mentioned to hold or even occupy any land.' They are 'placed on the demesnes' of the manors, that is, on the part reserved for the sustenance of the lord himself. This location on the demesne came to be taken as prima facie evidence of bondage, a lord in an 'exceptio villenagii' being held to prove that the person claimed 'est soen astrier et demourrant en son villenage.' I incline to think that in this connexion 'astrier' means, as Selden has interpreted it, in 'the lord's dwelling-house [7].' At any rate, it is curious that in the case of a claim by the duchess of Buckingham to certain persons as bondmen and villains regardants of her manor

[1] Habitually in the phrase 'villain regardant,' which came in, as Professor Vinogradoff has shown, towards the middle of the fourteenth century (Villainage in England, pp. 50–53). On the position of the villain as distinguished from the nativus, see the writer's introduction to the Inquisition of 1517 in the Transactions of the Royal Historical Society, 1892.

[2] 'Pur vileyns de saunc;' Britton III. ii. 12. 'Tenir en pure villenage;' Old Tenures, ed. 1525, p. 6.

[3] Bracton's Note Book, iii. 995; Nasse, Agricultural Community of the Middle Ages, p. 39.

[4] Nouel Natura Breuium, Droit Clos.

[5] MS. R. O. Court of Requests; Mr. Hunt's Cal. Bundle 12, no. 7.

[6] Here 'nyeffes' is perhaps the feminine of 'villayne,' a sense to which it had been narrowed by the time of Littleton. Tenures, § 186.

[7] Britton II. 155.

of Rompney, near Cardiff, evidence to this effect was submitted. 'He saith to the vth article that he doithe remembre and know that the pleyntiffes and others ther bloode and Auncestours have vside to do sarvice at the commaundement of the late Duke and his Auncestours in carying of wodde and other Busynes aboute the sayde Duke's house[1].' If this view be correct, Britton was stating the maximum of proof, *ex majore cautela*, for Professor Vinogradoff is successful in showing that according to Bracton (f. 190) it was enough to prove the plaintiff 'a serf and holding in villainage and under the sway of a lord[2].'

About the legal incidents attaching to the position of a bondman, the representative of the 'naifs' of the so-called 'Laws of William the Conqueror[3],' of the 'puri nativi' of Fleta[4], of the 'pur vileyns de saunc et de tenementz' of Britton[5], of the 'serfs' of the Myrrour, there is little room for dispute. Whatever else may be said of the Myrrour, it cannot be accused of undue hostility to the rights of the dependent classes. As to the 'serfs' it is very explicit. 'Nota que villeins ne sont my serfs . . . . Ceux ne poiont rien purchaser; forsque al oeps lour seigneur. Ceux ne scauent le vespre de quoy ils servient al matin, ne nul certainty des services. Ceux poient les Seigneurs firger, cipper, enprisoner, battre and chastiser avolunt, salve a eux les vies, ou les membres entires. Ceux ne deviont fuer ne adire de lour sars, tant come ils trovent doiont vivre ne nul ne list ee les receiver sans le gre lour Seigneurs[6].'

That the practice of the Norman barons was such as is described we can well believe. Mere considerations of expediency must have so far operated to the benefit of the bondman as to restrain his lord from the confiscation of his property outright. Nevertheless, the right 'talliare villanos suos de alto et basso pro voluntate sua[7]' was undoubtedly asserted, 'villanos' being here used in its later sense of 'bondmen.' In the homily of the 'Persone's Tale' Chaucer refers to the exactions levied both upon villains and bondmen. 'Thurgh his cursed synne of avarice and covettise comen these harde lordschipes, thurgh whiche men ben destreyned by talliages, custumes and cariages more than here duete of resoun is; and elles take they of here bondemen amercimentes, whiche mighte more reasonably ben callid extorciouns than mercymentis.

[1] 1527, Br. Cal. iv. 3447. Printed at length in Furnivall's Introduction to Ballads from Manuscripts, i. 11 foll. So in *Netheway* v. *Gorge*, MS. R. O. Ct. Req.; Mr. Hunt's Cal. Bdle 5, No. 21, the defendant is represented as threatening the complainant, whom he claimed as bondman, 'that he would make hym to turne a broch in his kechyn.'

[2] Vill. in Engl. p. 57. [3] § xxx. [4] i. 8. 5.

[5] Britton III. ii. 12. [6] Le Myrrour des Justices, p. 169.

[7] T. T. 18 Ed. i. p. 221. That this refers to bondmen under the name 'villani' is evident from the context, 'et villani faciunt merchetum carnis et sanguinis.'

Of whiche mersyments and raunsonyng of bondemen some lordes stywardes seyn that it is rightful, for as moche as a cherl hath no temporal thing that it nys his lordes, as thay sayn. But certes, thise lordeshippes doon wrong, that bireven here bondemen thinges that they never gave hem. . . . Soch is the condicioun of thraldom[1].'

No doubt the gradual growth of public opinion in favour of liberty restrained the lords of manors from wanton oppression of their bondmen. Many bondmen became tenants of customary holdings, especially towards the close of the fourteenth century[2]. The incidents of tenure remaining constant to the land, they then enjoyed security so long as they performed their services[3]. Their liability to tallage was, it is true, carefully recorded, the court-rolls distinguishing between villains by blood ('villani capitis') and villains 'ratione tenurae' only[4]. This accords with a precept of Fleta[5]. But Fleta says of the customary tenants without distinction that the tallages are to be 'sine destruccione & exilio faciendo[6].' According to 'The Laws of William the Conqueror[7],' 'Cil qui custiuent la terre ne deit lum travailer se de lour droite cense.' This is under the heading 'De colonis terrae,' i. e. the villains, plainly distinguished from the 'De Nativis' with which the following section is concerned. Bracton or a commentator applies this principle to 'servi,' giving them a remedy against their lords 'propter intollerabilem injuriam, ut si eos destruant, quod salvum non possit eis esse waynagium suum[8].' The same seems to reside in the exceptional case in which serfs, according to the Myrrour, were at liberty to leave their service, namely, when they had no livelihood[9]. It suggests itself, though the question is compassed by obscurities, that the admission to customary lands was the point at which the right of 'waynage' attaching to the tenure of customary lands accrued to the bondman.

In his learned preface to the second volume of the Selden

[1] This passage illustrates the degradation of terms. The 'Ceorl' was originally the 'twy-hynd' man, whose wergild was two hundred shillings, while the 'thrall' had no wergild, but paid 'with his hide.'

[2] At Castle Combe in 1352; Hist. of C. C., p. 81. On the manors of St. Paul's at about the same date; Domesday of St. Paul's, pp. lvi-lix. On those of Cirencester in 1402; Fuller on the Tenures of Land in Cirencester, Bristol and Gloucester Arch. Soc. ii. 285 (1877).

[3] Y. B. 32 & 33 Ed. I, p. 514; Fulier, pp. 312-315; Seebohm, English Village Community, p. 30; Trans. R. Hist. Soc. 1892, p. 216.

[4] T. E. Tomlins' ed. of Littleton's Tenures, p. 241.

[5] 'Item de custumariis quot sunt, & quae sit eorum secta . . . & qui possunt talliari ratione sanguinis nativi, & qui non.' Fl. ii. 71, § 71.

[6] Fleta l. s.c. [7] § 29. [8] Bracton f. 6, but see p. 363, n. 2, infra.

[9] On the other hand the Myrrour remarks that the clause for 'waynage' in the Great Charter does not concern serfs, 'car de serfs ne fait el my mencion pur ceo que ils ount rien propre que perdrent.' If 'villain' be taken here simply as a term of tenure the statements of the Myrrour would be reconcilable.

Society's publications, Professor Maitland has shown the power and independence of the ancient customary courts in which the suitors, that is, the customary tenants themselves, not only found the facts but also framed the customary law[1]. By an encroachment upon the lord's right, since no mere custom could bind him in tallaging a 'nativus[2],' the customary tenants had in practice established a custom as to tallages. It is intelligible that sensitiveness to the public sentiment against inequitable tallages, the ambition of feudal influence, engrossment in war or in the service of the sovereign would all tend to render the lords of manors content to leave these details to the steward and the customary court. When once time had ratified such an usage the lord would find it troublesome to vindicate his rights. In the history of the manor of Castle Combe[3] we find such a case, in which the tenants actually reject the valuation of the estate of a wealthy bondman holding customary land, made by the lord and his 'council' as a basis for the levy of a tallage, and substitute a valuation of their own.

It has been seen that it was probably only in the case of bondmen upon customary lands that a practical protection was secured against ruinous tallages. The other customary tenants, some of whose ancestral titles to freedom might be doubtful, would be disposed to consider their interest sufficiently near to make an effort for the restraint of arbitrary exactions prudent. That bondmen did frequently acquire fortunes we know[4]. On the other hand, the assertion of the lord's right to bondmen's realty and personalty, to use a modern phrase, and the practical enforcement of it was as unequivocal in the sixteenth century as in the age of the Myrrour.

The language of Fitzherbert upon this point is singularly like

[1] 'Dicit plena curia quod si qua mulier fuerit de dominico plene egressa et fuerit maritata libero homini poterit tunc bene revertere et recuperare dicta mulier jus et clamium si quod habet in aliqua terra; si autem copulata fuerit servo, tunc servo vivente non poterit, set post mortem bene potest.' Selden Soc. ii. 24. A case occurred in the Star Chamber in 1537 in which Lord Braye, as lord of the manor of Houghton in Bedfordshire, complains that 'the copyhold jurors at the customary court have fraudulently combined to find the custom of the manor to be fee simple in Ancient Demesne.' *Braye* v. *Barbor*, MS. R. O. S. C. P. vol. vi. 32, 33.

[2] 'Qar entre lui (the lord) et ses tenanz a volunte ne poet usage ne custom estre afferme; qar cest sa terre demesne, et il les poet ouster a sa volunte demene.' Y. B. E. T. 13 Ed. III (27), p. 231. The legal point that this applies to bondmen upon the lord's demesne must not be lost sight of, though the translator is evidently unconscious of it.

[3] P. 223.

[4] Domesday of St. Paul's, p. xxv. I have grave doubts whether John de Reeve in the ballad does not use the word 'bondman' loosely for 'villain,' which seems to have been its original sense, if we may accept Mr. Furnivall's suggestion that 'bonde' was the Danish equivalent of the Anglo-Saxon 'ceorl.' Furnivall in 'Bishop Percy's Folio Manuscript' Ballads and Romances, ii. p. xxxvii; see also Skeat's Engl. Dict. s.v.

that of Chaucer. 'Howe be it in some places the bondemen continue as yet, the whiche me semeth is the greatest inconuenience that now is suffred by the lawe. That is, to haue any christen man bounden to an other, and to haue the rule of his body, landes and goodes, that his wyfe, chyldren, and seruantes have laboured for all their life tyme to be so taken, lyke as and it were extorcion or bribery[1].' Fitzherbert also condemns a practice to which reference has already been made, but which under the vigilant severity of the Tudors we can scarcely believe to have been very prevalent. 'There be many freemen taken as bondemen, and their landes and goodes taken fro them, so that they shall nat be able to sue for remedy, to proue themselfe fre of blode. And that is moste commonly where the free men haue the same name as the bondmen haue, or that his auncesters, of whome he is comen, was manumysed before his byrthe. In such case there can nat be to great a punyshment[2].' The point of this is that, as Hargrave states the usage in his argument in Sommersett's case[3], 'in pleading villenage where it had not been confessed on some former occasion, the lord always founded his title upon prescription.' This prescription necessarily extended to the villain's ancestors, and this is the case whether the claim was to a villain in gross or to a villain regardant[4].' The reference of Fitzherbert seems to be to the enslavement of persons living adjacent to a manor and therefore claimed as 'in gross.' This may explain the appropriation by the lord of their lands, though it is to be noted that the claim of a freehold tenure by a holder in villenage, whatever his personal status might be, *ipso facto* worked a forfeiture, as being 'to the disinheritance of the lord[5].' Although it is true that Sir Thomas Smith knew of no villains in gross, they appear to have existed at the beginning of the century, at any rate in Wales[6]. Throughout the sixteenth century we find the legal right of the lord to the

[1] Surueyenge, ch. 13, p. 31, ed. 1539. I apprehend that 'extorcion' is the equivalent of our modern 'confiscation,' which is the point of Chaucer's censure. 'Bribery' is, of course, used in its archaic sense of 'robbery.'

[2] Surueyenge, ch. 13, p. 31, ed. 1539. The meaning is that the claimant was bound to prove bondage in the ancestors of the person claimed by other bondmen of the same blood. Bacon, Abr. Villenage, 66. Hargrave in Sommersett's case, London, 1772, p. 38.

[3] Ed. London, 1772, p. 37.

[4] Professor Vinogradoff (Vill. in Engl. p. 50) contradicts Littleton's assertion (Tenures, § 182), that a claim to a villain in gross is proved by prescription. I cannot accept the authority of Professor Vinogradoff against that of Littleton. Hargrave appears to me to establish his proposition that 'if precedents had been wanting, the authority of Littleton, according to whom the title to villenage of each kind, unless it has been confessed, must be by prescription, would not have left the least room for supposing the pleading of a prescription less necessary on the claim of villeins in gross than of those regardant.' Argument in Sommersett's case, ibid.

[5] Y. B. M. T. 13 Ed. III. 54, p. 104.

[6] See a confirmation on the part of three 'free tenants of our lord the king' of 'seven of our natives' . . . 'with their successors procreated and to be procreated and all their goods,' &c., at Rhandirgadog, 20 Henry VII (1504).

bondman's lands asserted in the widest language. Among various commissions of enfranchisement issued by Elizabeth is one of the date 1564, 'To enquire what lands William Packman a bondman had[1].' The preamble, after naming the commissioners of enquiry, runs: 'Wheras we be credibly enformed that William Packman of Mondesley in our said countie of Norfolk fisherman is oure bondeman and villaine regardante to our saide manour of Gymyngham parcell of our said duchie in our said countie and is seised and possessed of diuers landes tenementes goodes and chattels by reason whereof the said landes tenementes goodes and chattels ought of right to come to our handes and possessions as in the right of our said duchie,' &c. The commissioners are then instructed to ascertain 'of what landes and tenementes he the saide William Packman nowe is or anie tyme heretofore hath benne seised either by chartre copie of court rolle or otherwise, what estate he hath or hadd in the same, wher the same landes and tenementes doe lye and how manie acres the same doe conteine, the names of the occupiers thereof together with the yearly rentes which they paie for the same, what the same is worth yearly to be letten to our most proffitt and availe,' &c. In the Patent Roll for the 17th year of Elizabeth (1575), part 2, membrane 39 is a grant reciting letters patent of January 17, 1574–5, issued at Westminster, by which the Queen grants to Sir Henry Lee, knight, as a reward for his services, the fines and compositions that he could extract from any 200 of her bondmen and bondwomen for the manumission of themselves, their families and their lands. The second letters patent proceeded to make Sir Henry Lee a present of the fines and compositions from 100 more of the Queen's bondmen and bondwomen. Upon their refusal to pay or to compound for their manumission, Sir Henry is empowered to seize their lands as his own and to eject them. The patent further recites that many bondmen have conveyed or given away their lands to the Queen's damage and loss, and empowers the grantee to make search for such cases. In that event, he is to retain the lands so reclaimed, in whose hands soever they be[2]. It must be remembered that 'villanus non quoad dominum sed quoad extraneos pro libero habetur,' 'villanus' being here, of course, used in its degraded sense[3]. The enquiries, therefore, embraced all lands held outside the manors to which the persons in question were bondmen. The right of the lord to sub-

[1] MS. R. O. Duchy of Lancaster Surveys and Depositions, Incognita, 6 Eliz.

[2] Notes and Queries, 4th ser., xi. 298. A similar commission issued in 1574 to Burghley as Lord High Treasurer and Mildmay as Chancellor of the Exchequer to enfranchise Crown bondmen in the counties of Cornwall, Devon, Somerset and Gloucester. Rymer, Foed. xv. p. 731, 16 Eliz.

[3] Hengham, Summa viii.

stitute himself for his bondman was enforced and not disputed in one of the last (1567) cases of villenage heard in England, although judgment was given for the alleged villain on other grounds[1]. In this case one Butler, lord of the manor of Badminton in Gloucestershire, claimed one Crouch as villain regardant to his manor of Badminton and made an entry on Crouch's lands in Somersetshire. The judges held that no prescription against Crouch as villain was proved; but the right of the lord, had the proof been forthcoming, was not questioned. That public opinion was hostile to its assertion may be inferred from the legal subtleties by which the judges contrived to defeat it[2]. Norden, writing in 1617 of the survey of the manor of Falmer, Sussex, mentions the existence of three bondmen there. 'Thomas (Goringe) hath the reversion of a cotage now in the tenure of William Jeffereye. But mee thinkes this kind of advantage is nowe out of season; yet, were they men of ability, they might be, upon some consideration, infraunchized[3].'

It has been seen that in the commissions of enfranchisement the rights of the lord over the bondman's land were asserted in large terms. But it may be laid down without much hesitation that these rights could not be enforced to the point of eviction upon those lands which were held in the manor by copy of the lord's court-roll, or those, if any such there were, held upon lease from the lord. These last cases were perhaps comparatively uncommon; but we find that in 1525 bondmen, presumably belonging to the duchy of Cornwall, were mining lessees of the duchy[4], an arrangement which would have had no meaning had the duchy been able arbitrarily to break its agreement. It is true that no lands are excepted from the enquiries of Elizabeth's commissioners, because those enquiries were for the purpose of obtaining a valuation upon which to base the composition to be exacted for manumission. That in the fourteenth century even bondmen were protected by the custom attaching to their lands, where such customary lands were held by them, I have already mentioned. Nor should I think it necessary to insist on this point were it not that it has lately been contradicted—I cannot say disproved—by a well-known writer on economic subjects[5]. Customary land was, as Littleton

[1] Dyer, 266 b. Campbell's Lives of the Chief Justices, i. 188. Hargrave notes four subsequent cases in which villenage was pleaded in the courts, the last being in Hilary Term, 15 James I (1618). 'From the 15th of James the First the claim of villenage has not been heard in our courts of justice.' Noy 27; Argument in Sommersett's case, p. 33.

[2] Dyer, 48 b. pl. 1 and 4.

[3] From an unpublished survey of certain Crown manors. Notes and Queries, 1st ser., i. 139.

[4] Br. Cal. iv. 1533.

[5] Professor Ashley, in the English Historical Review for April, 1893. Professor

tells us[1], such as had been governed by custom from time immemorial. The customs were found by the tenants themselves sitting as a customary court under the presidency of the lord's steward, and the mere fact of a grant having been made to a bondman could not alienate from the land the character which had been attached to it. 'Consuetudo altera lex.' So much for the general principle. Now for the practice of the sixteenth century. In the year 1561 depositions were taken at Spillesby in Lincolnshire upon a commission of enquiry as to the terms of enfranchisement of the Queen's 'Bondmen Regardaunte to her Mannour of Lytle Stepinge' in that county, belonging to the duchy of Lancaster[2]. The enquiry, as was usual, embraced the lands and personalty of the persons concerned. The principal evidence was that of Christopher Yarbrughe of Lusbye, gentleman. Upon the point now at issue he testified as follows: 'Item the said Christopher Yarbrughe gent. sworne and examyned towchinge Thomas Grave one other of the Quenes Maiesties bondemen Regardaunt to her graces said mannour of Litle Stepinge aforesaid deposyth and saieth that the same Thomas Grave about ii. yeres last past purchased Landes and tenementes lienge and beinge in Westerkele aforeseid to the yerly value of xiiis. iiiid. and afterwardes gave the same into the Quenes handes and toke the same agayne to hold to hym and to his heiers as of her graces said mannour of Lytle Stepinge aforesaid by Copie of Court Roulle accordinge to the custome of the said mannour by the yearly rent of viiid. paiable to the Quenes Maiestie.' Here is a transaction which can scarcely have but one meaning. Upon the principles already laid down, the Queen would have the right of entering upon the bondman's newly purchased freehold. The Queen waives her rights in consideration of a small yearly rent of five per cent. on the annual value[3]. On the other hand, the security of the purchaser is assured by the entry on the court-roll. Whether the tenant appears upon the roll as a freeholder of the manor or as a copyholder with a freehold estate is of no importance. The entry precluded the lord from seizing the land of his bondman. 'Contract,' as Sir Henry Maine might have put it, 'asserted itself

Ashley's assertion is that not even customary tenants or copyholders were protected during the greater part of the period 1450–1550, *a fortiori*, not bondmen occupying customary lands. For the evidence generally as to the large protection accorded by the law to customary tenants both before and during this period, see the writer's 'Introduction to the Inquisition of 1517,' in the Transactions of the Royal Historical Society, 1892, and especially as to bondmen holding by custom; ibid. pp. 214–219. Further, as to copyholders and customary tenants, see an article by the writer in the English Historical Review for October 1893.

[1] Tenures, § 73.

[2] MS. R. O. Duchy of Lancaster Surveys, 2 Eliz. No. 17.

[3] This case suggests an explanation of some of those trifling rents, the origin of which is discussed by Professor Vinogradoff in Vill. in England, pp. 342–353.

over "status."' The legal maxim was well established, 'A man may not derogate from his own grant.'

A remarkable confirmation of my contention that the lord could seize such lands of a bondman only as were not held of him as customary lands occurs in a case tried in the Court of Requests in 1533[1]. The case, which has never been printed, will be best stated in the original words of the plaint. 'To the kynge our sovereigne lord. In moost petuose maner complayneth vnto your moost noble hyghnes your trewe and feythfull subiect and legeman William Netheway of Walton in the countie of Somerset husbondman that wher of late oon Edward Gorge knyght of the sayd countie sent his seruaunt callyd John Ballard vnto your humbly besecher to by of hym an oxe ffor his sayd master his howseholde youre sayd supplyant was ther with contentyd to sell hym an oxe pryse xxvi.s. whiche oxe your sayd suppliant delyuerd to the sayd John Ballard to the vse of his sayd master, whiche oxe the sayd Ballard receyvyd att the same pryse and when your said besecher demaundyd of the sayd Edward his money for the sayd oxe the sayd Edward fferr byyond good order of knyghthood and good gravyte to that degre & ordre apperteynynge in moost ragyouse maner sayd vnto your poore Oratour theis wordes in effect folowynge that is to saye Thow shalt have noo money of me ffor that oxe butt swerynge grete and detestable othis that he wolde have your sayd humble subgett his goodes ffor that he toke hym as his bondman and *that he wold sease his londes that he hyld of other men* and kepe them dewerynge his lyfe and that he wolde ffeche hym att an horse tayle and make hym to tvrne a broch in his kechyn,' &c. The evidence taken before the commissioners deputed by the Court of Requests was to the effect that although the complainant's ancestors had been bondmen, they had entered into a composition for manumission with the defendant. But the point is that, though the complainant was evidently a tenant, since he brings other tenants forward to swear that they had never known any claim against him as bondman put forward by the defendant, yet even the threats of the defendant do not go so far as eviction

[1] The authorization above-mentioned to Sir Henry Lee to seize land sold and given away is in no wise antagonistic to my position. These lands could not have been customary lands of the manor, since transactions with them would have been regulated by the steward, and would have been entered upon the court-rolls. Secrecy in that case would have been out of the question. They were, therefore, demesne lands or wastes, in occupation of the bondmen as tenants at will at common law. It may be added, that even had they been customary lands, the principle would have remained untouched. The alienation would have been breach of custom, legally penalized by forfeiture.

[2] *Netheway* v. *Gorge*, MS. R. O. Ct. Req.; Mr. Hunt's Cal. Bdle. 5, No. 21. These documents have but recently been calendered and have been heretofore inaccessible to the public.

from his land held in the manor. Had he been a mere tenant at will at common law upon the demesne it cannot be doubted but that in addition to his cattle, the defendant would have seized his lands.

The same conclusion is pointed to by negative evidence in another case which first came before the Court of Requests in 1535[1]. According to the complainants, a manumission of their ancestors had been granted by the predecessor in title of the Earl of Bath in 1478. The earl nevertheless claimed them as 'his villayns appendante vnto his manour of Holle' (or Holne) in Devonshire. In pursuit of this claim he 'toke from your said oratours and other your graces said subgiettes the value of ffoure hundrithe poundes in goodes.' An injunction was issued by Lord Russell, as Lord President of the Council in the West, ordering an interim replevin. The earl neglecting to obey this, appeal was made to the Privy Council sitting in London. The goods in question, which did not all belong to the complainants, consisted, so far as these, the Burdes, were concerned, according to the earl's statement of defence of 'ten kyen three oxen one heyffer oone erlynge & xi shepe.' That the feeling of the earl was bitter is shown by his delays in making amends to the complainants[2] and by his recommencement of the persecution, after seven years' intermission, in 1552[3]. Notwithstanding this, there is no mention of any attempt to evict the complainants from their holding or to seize their land. Had they been tenants at will of the demesne at common law, this would have been an obvious course. Had they been tenants of another manor, the legal rights of the earl as against his alleged bondmen would have justified such action as was threatened by Sir Edward Gorge. The natural inference is that they were customary tenants, and this would explain the fact also common to both versions of the quarrel, that the earl only seized a part of the property of the complainants. He had, in a word, been careful to observe the legal limitations 'sine destruccione et exilio faciendo[4],' the villain's right to waynage of the Great Charter. Moreover, his defence suggests rather than states that the tallage was not arbitrary, but founded on custom, being the fine payable by customary tenants on the change of the lord[5]. In the same spirit a kind of apology is made for the

[1] MS. R. O. Ct. Req.; Mr. Hunt's Cal. Bdle. 12, No. 7; *Burde and Another* v. *The Earl of Bath.*

[2] After the issue of two writs of Privy Seal, which the earl disregarded, 'your said Oratour was drevyn eftesons to make suete unto the said late kynge and obteynede his maiesties letters once ageyne directed,' &c.

[3] MS. R. O. Ct. Req.; Mr. Hunt's Cal. Bdle. 5, No. 145.

[4] Fleta ii. 71, § 71; cp. Magna Charta, § 20.

[5] 'After whois deth the premyssis dyscendyd to the seyd now Erle as son and

levying of a tallage upon the widow of a wealthy 'nativus' of the manor of Castle Combe, no appeal being made to arbitrary power but to 'ryght and reson' as determining the amount of the assessment [1].

The 'manumission of lands' of bondmen, spoken of in Elizabeth's commissions of enfranchisement, refers to those services which were anciently rendered by freemen [2], but which, as the proceedings for manumission show, had generally been commuted even by bondmen in the sixteenth century. In the case of customary tenants the process had begun as soon as the early part of the thirteenth century [3]. Among the documents relating to Elizabeth's manumissions I have found but one example of the survival of services. They were certainly more numerous earlier in the century, but the conversion of arable to pasture made commutation more profitable to the lords, as less labour was needed upon the land [4]. The instance in question appears in Norfolk, upon the duchy of Lancaster's manor of Gymingham. In the 'declaration' of the commissioners of enquiry and assessment 'The seid Thomas Calke is seased in his demeane by copye of court Roll of one Tenement & twenty & eight Acres & i. Rode of lande holden of the Quenes maiesties manour of Gymyngham which payeth yearlie to the seid mannour in bond Reigt ten shyllynges iii. dayes worke in harvest iii. halfe dayes with a ploughe and ii. halfe dayes with a harrow.' No doubt one reason for the survival on land held by a bondman was the system of tallaging 'ratione sanguinis nativi.' Tallages

heyre of the seyd John by reason wherof the seyd now Erle entryd into the seyd manour of Holne with the appurtenauncez . . . & thervppon causyd seyser to be made,' &c. Cp. Gaird, L. & P. XII. ii. 262, July 15, 1537. 'We must "gressom" the tenants according to the custom here.' Robert Southwell to the Duke of Norfolk, after the death of the Earl of Northumberland. A grantee of monastic lands was complained of to the Court of Requests for having 'gressomed' the tenants. *Inhabitants of Whitby* v. *York*, Mr. Hunt's Cal. Bdle. 23, No. 13. This was probably a common pretext for the new proprietors to pillage the tenants. In the time of Elizabeth a judicial decision restricted the occasions of 'gressom' to changes due to the act of God. Coke on Littleton, § 74.

[1] Hist. of the Manor of Castle Combe, pp. 222, 225.

[2] 'Non est tam liber qui non habet arare et cariare cum plaustro si habet vel cum biga,' &c. Cirencester Abbey Register, Fuller, p. 286; cp. Bracton's Note Book, i. 916.

[3] Fuller, p. 310; Hist. of Castle Combe, p. 81; Selden Soc. iii. 78.

[4] A case occurs in the Star Chamber Proceedings (MS. R. O. vol. 13, p. 83), *Inhabitants of Draycote* v. *Sir John Rodney*, in which the plaintiffs, who were copyholders, complained that 'the seid sur John daily compelleth your seid subiectis to leve their owne besynes and to plowe his lande with their oxen and ploweis and also to carie his wodde and tymbre and stone to his own house, without geving vnto them any mete drink or wages for the same.' To this defendant answered, 'that at certain tymes long passed his seid tenauntis of their good mynde and free will to his knoledge have holpen him with their plowes and he hath in like maner holpen theym with his plowes at their busynes after the olde custume and further seith that at such tymes as his tenauntis did help him thei hadde meat and drink convenient.' I find in a lease of 1509 a covenant for 'five dayes work of tylth,' the tenant being apparently a freeman. MS. R. O. Ct. Req.; Mr. Hunt's Cal. Bdle. 4, No. 30.

would leave the bondmen less able to purchase commutation than the ordinary free customary tenant.

The practice of tallages with regard to the bondmen in occupation of customary lands has been considered. In the case of a bondman at will upon the demesne there was absolutely no limit, save life and limb, to the lord's power of oppression. 'Par ley de tere tut ceo qe le vileyn ad si est a soun seigneur[1].' In 1280 the abbot of Burton justified his seizure of the cattle of certain 'villains,' who, as it appears in the course of the proceedings, were 'nativi,' by saying that they had nothing of their own 'extra ventrem[2].' The principle was, we have seen, acted upon in Chaucer's time, though already looked upon as discreditable. It is implied in the conveyance of 'nativi' 'together with all their goods and chattels, wheresoever found[3].' It is stated explicitly by the royal officers in their survey of the lands of Glastonbury, who record the numbers of 'Bondemen of blood whos Bodies and goodes are allwayes at the king's pleasure[4].' It is asserted in the articles of enquiry by the commissioners of enfranchisement, of which one is as to the goods and chattels and their value in the possession of the bondman[5]. In 1527, in the case of the bondmen of the manor of Rompney against the Duchess of Buckingham, we find the ducal officer taking an inventory preparatory to its enforcement[6]. But for the summary intervention of the commissioners empowered by the Court of Requests, the defendant in *Netheway* v. *Gorge* would have retained possession of the ox seized from his alleged bondman without even the decent pretext of a customary tallage[7].

There remains one right over the bondman, that over his person and the persons of his family, manumissions and conveyances always including the 'sequela et progenies.' The language of Fitzherbert does not convey the impression that violence to or confinement of the person of the bondman was in his age a common practice. The evil he denounces is that the lord should 'have the rule of his (the bondman's) body, landes and goodes[8].' Nor does

[1] Y. B. E. T. 13 Ed. III (17), p. 235; cp. ibid. M. T. (54), p. 102; Britton II. vii. 1.

[2] Staffordshire Collections, pt. V. i. p. 81. Professor Vinogradoff has shown (Law Quarterly Review, i. 197) that the statement attributed to Bracton that 'servi' had a right to 'waynage' is a gloss.

[3] MS. Brit. Mus. Cotton Coll. Julius C. 7, p. 139; Notes & Queries 2nd ser., viii. 278. Cp. the precedents in Madox, Formulare Anglicanum.

[4] Hearne's Works, vol. iv (Langtoft), Oxford, 1725.

[5] MS. R. O. Duchy of Lancaster Surveys, 2 Eliz. No. 6; 6 Eliz. p. 35; 7 Eliz. *re Paine.*

[6] Printed from MSS. R. O. in Furnivall's Introd. to Ballads from MSS. Ballad Society, i. 11 foll.

[7] They ordered the defendant Gorge to pay for the ox, it appearing that he had some years before received a composition for manumission.

[8] Surueyenge, ed. 1539, ch. 13, p. 31.

Sir Thomas Smith suggest that the powers over the bondman's person assigned by the 'Myrrour' to the lord were actually enforced. But in times when powerful nobles did not scruple to imprison free men[1], it is not likely that bondmen escaped untouched. The lords, at any rate, as may be seen from the pleadings in *Netheway* v. *Gorge*, had not forgotten their ancient powers, and apprehensions are expressed by the plaintiff 'lest that the seyd Sir Edward wolde take or imprison hym for a bondman[2].' Undoubtedly the lords exacted forced labour from the whole of the bondmen's family where they were not protected by the occupation of customary land, and to this the expressions of Fitzherbert refer. The chances of oppression were increased by the common law rule that a bondman might not sue his lord. In 1527 the duchess of Buckingham, in imitation of the practices of her deceased husband, imprisoned certain bondmen of her manor of Rompney. Upon their case being taken into the king's courts, she entered the plea that as they were her bondmen she was not under obligation to answer them[3]. No doubt the king, as a general redresser of grievances, interfered in behalf of bondmen when the misconduct of lords was brought before him[4]. These sporadic instances of redress were most beneficially replaced by the permanent establishment under Henry VII. of the Court of Requests 'for the heryng of power menne's causes[5].' As conducted down to the time of the accession of Elizabeth, this Court and that of the Star Chamber were of invaluable service to the poor and oppressed. They protected them against the venality both of[6] judges and

[1] In MS. R. O. S. C. P. Bdle. 19, p. 223 is a complaint to Warham as Chancellor that Edward Stafford, Duke of Buckingham, had imprisoned twelve persons in the castle of Newport for a refusal to pay rent to him for occupancies in the manor of Holton, the title to the manor being then in dispute in the Star Chamber, of which Warham was *ex officio* president. Buckingham is further charged with disobedience to an order of the Privy Council of the Marches of Wales for their release. Upon occasion of another dispute with respect to the customs of the Lordship of Penkelthelo in Wales, he imprisoned five other persons, presumably freemen, who petitioned the Star Chamber during Wolsey's chancellorship for release. MS. R. O. S. C. P. Bdle. 21, No. 179. Unless, with Shakespeare, we are to credit the infamous Kynvett, his steward and betrayer, with the various acts of oppression practised upon the tenants of Buckingham's estates, that nobleman was, to judge by contemporary documents, one of the most rapacious, tyrannical and unscrupulous of Henry VIII's courtiers. Cp. Br. Cal. III. i. 1286, pp. 507, 509; Trans. R. Hist. Soc. 1892, pp. 187–191.

[2] MS. R. O. Ct. Req., Mr. Hunt's Cal. Bdle. 5, No. 21.

[3] Br. Cal. iv. 3447. It does not appear to what court these proceedings belong.

[4] See the tale of King Edward and the shepherd in Hartshorne's Metrical Tales, p. 35.

[5] MS. Ct. Req., Decrees, &c., vol. 5, p. 86.

[6] Gaird, L. & P. XII. ii. 186, 41; XI. 540, Acts of Privy Council, i. 523. The attempt to bribe Sir Thomas More is a well-known incident of his life. The cause of the judges' venality doubtless was the irregularity of their pay, this being in the fifteenth and sixteenth centuries furnished by the staplers of Calais, who were constantly behindhand. 'In partem solucionis arreragiorum' occurs in the receipt of Richard Pygot J. in 1474 (MS. R. O. Q. R. Anc. Misc. Realm of France, $\frac{44}{4}$).

counsel[1], then a frequent source of complaint. They swept away the legal subtleties by which plaintiffs were robbed of redress. They afforded no opening for the intimidation or corruption of juries. By summary process they endeavoured to put an end to 'the law's delay,' until the pressure of complaints overtook their despatch. And in this matter of bondage their judgments show that they maintained the ancient traditions of royal justice 'in favorem libertatis.'

I. S. LEADAM.

A receipt by Catesby J. in 1473 shows that his salary was two years overdue (Ibid. $\frac{yy}{yy}$).

[1] In a case before the Star Chamber in 1516 (*Alyson* v. *Roose* and others) the allegation is made by the plaintiff that in a former case before the Court of Common Pleas, in which he was defendant, his counsel was bribed to offer no defence. Even as late as the reign of Elizabeth both judge and counsel were represented on the stage as accepting bribes, and the counsel as betraying his client. See 'A looking glasse for London and England,' by Thomas Lodge, London, 1598.

A DOUBT ON THE STATUTE OF FRAUDS.

THE Statute of Frauds was enacted in the reign of Charles II, with the express object of restraining Frauds and Perjuries. It attempted to effect this in part by requiring[1] a plaintiff who wished to hold a defendant to certain specified contracts to produce a document or documents containing the terms of the contract, and authenticated by the signature of the defendant or his agent. It is a commonplace among lawyers that these unhappy sections have enabled unconscientious defendants to escape, under the protection of a court of justice, from their undoubted engagements in many more cases than they have prevented dishonest plaintiffs from enforcing by perjury their fraudulent designs on unsuspecting defendants. But there is one particular case where the statute as interpreted in modern times acts with a peculiar harshness and an injustice unusual in the courts of justice in England. *A* and *B* make a contract in writing duly signed, dealing with one of the matters mentioned in these sections. Afterwards in the course of carrying out the terms of the contract, by arrangement and for the convenience of both, they alter one or other of the material terms of the contract, but omit to put the alteration in writing duly signed. Then *B* without any sufficient reason declines to perform his part either of the original contract or of the contract as altered. *A* brings an action. *B* pleads that the original contract has been rescinded by the alteration by consent of a material term, and that *A* cannot sue upon the new contract because the alteration has not been written down. That is to say, *B* contends that the altered contract is valid to prevent *A* from suing upon the original contract, but that it is invalid as a cause of action. At the present day the Courts will agree with *B*, and will give judgment for him with costs. It is contended here that the law was not always so, and that the law as declared by these later decisions is unjust and inequitable, though the decisions in themselves may be technically correct, and that some amendment of the Statute of Frauds is required analogous to the amendment effected by the Mercantile Law Amendment Act[2], excepting a promise to answer for the debt default or miscarriage of another from the general rule requiring

[1] 29 Car. II. c. 3, secs. 4 and 17.

[2] 19 & 20 Vict. c. 97, sec. 3.

that the consideration for such promise must appear in writing as well as the promise itself.

It may be conceded *in limine* that in spite of the opinion of Parke B. in *Carrington* v. *Roots*[1] and of Pollock C.B. in *Reade* v. *Lambe*[2], a contract within the provisions of the statute and not satisfying its requirements is not void, but subsists between the parties for some purposes though no action can be grounded upon it[3]. And it may be taken on the authority of the case last cited[3], that notwithstanding the difference of the words 'no action shall be brought,' &c. in s. 4 and 'no contract ..... shall be allowed to be good,' &c. in s. 17, there is no difference in the effect of the two sections on contracts that do not satisfy their provisions.

In *Case* v. *Barber*[4] the plaintiff declared in *indebitatus assumpsit* for £20 for board and lodgings supplied to the defendant's wife at the request of the defendant. The latter pleaded that after the making of the promise and before action brought, it was agreed between the plaintiff and the defendant and the son of the defendant that the plaintiff should deliver to the defendant some clothes of the defendant's wife detained by the plaintiff, and should accept the defendant's son as her debtor for £9 in full satisfaction and discharge of the premises in the declaration mentioned. The plaintiff demurred, and after argument judgment was given for the plaintiff. 'Admit the agreement would bind, yet now by the Statute of Frauds and Perjuries, 29 Car. II, this agreement ought to be in writing, or else the plaintiff can have no remedy thereon .... When the defendant pleads such an agreement in law, he must plead it so that it may appear to the Court that an action will lie upon it, for he shall not take away the plaintiff's present action and not give him another upon the agreement pleaded.' This is an express decision on the point here discussed in favour of the plaintiff.

In *Moore* v. *Campbell*[5] the plaintiff purchased from the defendant fifty tons of hemp expected to arrive at Liverpool by the ship George Green, at the price of £34 a ton from the quay, and the contract was in writing. When the ship arrived, the agent of the plaintiff and the defendant agreed verbally that the hemp should be warehoused, and this was done. The plaintiff refused to receive the hemp from the warehouse on the ground that the warehouseman, in accordance with the usual practice at the port of Liverpool, declined to guarantee the quantity. The defendant resold the hemp and the plaintiff brought his action. At the trial the judge

[1] 1837, 2 M. & W. 248.
[2] 1851, 6 Exch. 130.
[3] *Brittain* v. *Rossiter*, 1879, 11 Q. B. D. 123, Brett, Cotton and Thesiger L.JJ.
[4] 1681, 33 Car. II. B. R., Sir T. Raymond, 450.
[5] 1854, 10 Exch. (1 H. & G.) 330, Parke, Alderson and Platt BB.

directed a verdict for the plaintiff, and the Court ordered a new trial on a point not material here. But the defendant had pleaded *inter alia* that 'after the making of the agreement and before any breach the agreement was mutually rescinded by the plaintiff and defendant,' referring to the verbal arrangement that the hemp should not be taken from the quay but should be warehoused. In dealing with this point Parke B., who gave the judgment of the Court, said, 'We do not think that this plea was proved by the evidence. The parties never meant to rescind the old agreement absolutely which this plea, we think, imports. If a new *valid*[1] agreement substituted for the old one before breach would have supported the plea we need not enquire, there being neither note in writing, nor part payment, nor delivery, nor acceptance of part or all.' From this it appears to have been the opinion of Parke B. and his colleagues (Alderson and Platt B.B.) that an agreement invalid by reason of the Statute of Frauds could not be pleaded as a defence to an action founded on a contract satisfying the provision of the statute.

In *Noble* v. *Ward*[2] the agent of the defendant gave to the agent of the plaintiff on August 12, 1865, an order in writing for large quantities of cloth, the delivery to commence in three weeks and to be completed in eight or nine weeks. On August 18 a second order in writing was given, the cloth to be delivered to follow on after the order of the 12th instant, and to complete in ten or twelve weeks. In September the plaintiff made a first and second delivery on account of the order of August 12. After some discussion as to the time of delivery and the quality of the goods, a verbal arrangement was made at an interview on September 27, and it was agreed to cancel the order of August 12, and to extend the time for delivering the cloth under the order of August 18. Goods were tendered by the plaintiff in time to fulfil the agreement of August 18 or of September 27. The defendants refused to accept the cloth and the plaintiffs brought their action. The defendants pleaded *inter alia* rescission of the agreement, and all the discussion in the case turned on this plea. At the trial Bramwell B. nonsuited the plaintiffs, on the ground that the agreement of August 18 had been rescinded by the parol agreement of September 27, and that the plaintiffs could not resort to the latter because it was not in writing. This is in accordance with the later decisions cited presently. Before the Court of Exchequer Mr. Mellish argued for the plaintiffs: 'The agreement of September 27 was void altogether.

[1] This word is italicized in the judgment.

[2] 1866, L. R. 1 Exch. 117, Pollock C.B., Bramwell, Channell and Pigott BB.; and 1867, L. R. 2 Exch. 135, Willes, Blackburn, Mellor, Montague Smith and Lush JJ.

Ought it therefore to be good to rescind the contract of August 18? It should be good for no purpose.' And after citing *Moore* v. *Campbell*[1] he continued, 'So here where there is nothing to show an agreement wholly to rescind the contract of August 18, and where there is only an attempt to make a new contract for the sale of goods without complying with the provisions of the statute, the plaintiff may, if he pleases, revert to the written contract.' This argument is in accordance with the decision in *Case* v. *Barber*[2], and was adopted by the Court. Bramwell B. retired from the position he had taken at the trial, and prepared the judgment of the Court. In the course of it he said, 'My notes and my recollection of my ruling are that the contract of August 18 was rescinded and the contract of September 27 not enforceable, not being in writing. I think that was wrong. Either the contract of September 27 was within the Statute of Frauds or not. If not, there was no need for a writing: if yes, it was because it was a contract for the sale of goods and within the seventeenth section of the statute . . . The expression "allowed to be good" in that section is not a very happy one, but whatever its meaning may be it includes this at least, that it shall not be held valid or enforced. And this is what the defendant was attempting to do. He was setting up this contract of September 27 as a valid contract. He was asking that it should be good to rescind the contract of August 18 . . . The cases of *Goss* v. *Lord Nugent*[3], *Stead* v. *Dawber*[4], and others, only show that the new contract cannot be enforced, not that the old contract is gone. I think it was not,' &c. The defendants carried the case to the Exchequer Chamber, but without success. Mr. Holker, for the defendants, stated that their contention was that the contract of September 27, although not enforceable at law by reason of the seventeenth section of the Statute of Frauds, was good to rescind the previous contract of August 18; and Blackburn J. interposed with the remark, 'That argument amounts to this, that it is good for the purpose of rescission though not good for any other purpose whatever.' Willes J. gave the judgment of the Court. In the course of it he said, 'In setting aside the nonsuit the Court of Exchequer held that what took place on September 27 must be taken as an entirety, that the agreement then made could not be looked upon as valid, and that no rescission could be effected by an invalid contract. And we are of opinion that the Court of Exchequer was right. . . . And if direct authority were wanted to sustain this conclusion it is supplied by *Moore* v. *Campbell*[5], where upon a plea

[1] 1854, 10 Exch. (1 H. & G.) 330.
[2] 1833, 5 B. & Ad. 58.
[3] 1854, 10 Exch. (1 H. & G.) 330.
[4] 1681, 33 Car. II, Sir T. Raymond, 450.
[5] 1839, 10 Ad. & El. 57.

ot rescission the very point was taken by Sir Hugh Hill, who would no doubt have made it good had it been capable of being established.'

Case v. *Barber*[1] was not cited in either Court. But it would appear to have been the opinion of the three judges who decided *Moore* v. *Campbell*[2], and of the nine judges who decided *Noble* v. *Ward*[3], including in their number such great authorities on a matter of this kind as Parke, Alderson and Bramwell BB. and Willes and Blackburn JJ., that the defendant could not by pleading a contract unenforceable by the Statute of Frauds 'take away the plaintiff's present right of action and not give him another upon the agreement pleaded.'

In *Miles* v. *The New Zealand Alford Estate Co.*[4] the exact point here discussed did not arise. But in that case in answer to the plaintiff's claim the defendants set up a certain agreement, and the plaintiffs rejoined that the agreement did not comply with the provisions of the Statute of Frauds. North J. decided this point against the plaintiff. He relied on the practice of Courts of Equity in dealing with specific performance cases, citing the dictum of Grant M.R. in *Clarke* v. *Grant*[5], that the Statute of Frauds does not interfere with the defendant, and said[6] that there was nothing to prevent the defendants from setting up the agreement or to entitle the plaintiff to resist it by setting up the Statute of Frauds in reply. In the Court of Appeal Cotton and Fry L.JJ. did not allude to this point, but Bowen L.J., who dissented from their judgment, said, 'The only effect of the Statute of Frauds is to prevent the active prosecution of claims in the law courts which are not supported by written evidence at the trial[7].'

If this dictum be correct, then the judges who decided *Moore* v. *Campbell*[2] and *Noble* v. *Ward*[3] were wrong. If a contract that does not satisfy the provisions of the Statute of Frauds is valid for every other purpose except that of being the foundation of a plaintiff's claim, it follows that it is valid to rescind an existing valid contract; but this was denied by the judges in the cases last cited.

In *Todd* v. *Johnson*[8] the defendant and another who were lessees of a provincial theatre agreed in September, 1891, to dissolve the partnership on the terms *inter alia* that Johnson should continue the business and that the other partner should retire. Todd had for some time previously been the auditor of the theatre accounts,

[1] 1681, 33 Car. II, Sir T. Raymond, 450.
[2] 1854, 10 Exch. (1 H. & G.) 330.
[3] 1866, L. R. 1 Exch. 117, and 1867, L. R. 2 Exch. 135.
[4] 1886, 32 Ch. D. 266.
[5] 1809, 14 Ves. 519, 9 R. R. 336.
[6] 1886, 32 Ch. D. p. 279.
[7] 1886, 32 Ch. D. p. 296.
[8] Not reported; May 12, 1892, Day and Charles JJ.

and he was employed during the negotiations preliminary to the preparation of the deed of dissolution. His charges for this work, which was very complicated, amounted to £75. It was afterwards found as a fact that these charges were reasonable and moderate. In January, 1892, after the deed of dissolution had been executed, it was arranged verbally that he should be paid £25, and that he should accept that sum and the promise of Johnson to employ him for the next two years to audit the accounts of the theatre in satisfaction of the bill for £75. The £25 was paid, but shortly afterwards Johnson declined to employ Todd at all. It was assumed that the promise of Johnson to employ Todd for two years was unenforceable by reason of the Statute of Frauds, and Todd brought an action for the unpaid balance of his bill. Johnson set up the verbal arrangement mentioned above, and the Divisional Court on appeal from the County Court held that he had a good defence. *Case* v. *Barber*[1], *Noble* v. *Ward*[2], and *Miles* v. *New Zealand &c. Co.*[3] were cited before the Court, and the judges refused to follow the former cases and adopted the dictum of Bowen L.J. in the latter, and gave judgment for the defendant.

In *Macpherson* v. *Warner*[4] the plaintiff claimed a sum of money, the alleged balance of salary to which he said he was entitled under an agreement of February 6, 1888, appointing him manager of the defendant's business in England for five years from February 25, 1888. The defendant alleged that the original agreement had been rescinded by an oral agreement of December 10, 1889, by which the plaintiff had agreed to act as manager of the defendant's business on terms other than those contained in the original agreement, and that the plaintiff could not sue upon the oral agreement by reason of the Statute of Frauds. The plaintiff's counsel contended on the authority of *Noble* v. *Ward*[2] that the defendant could not set up one contract to prove that another had been rescinded, and then contend that the contract so set up is itself invalid as a cause of action by reason of the Statute of Frauds. Pollock B. observed that the oral agreement of December 10, 1889, was one that ought in all honour and conscience to be binding upon the defendant; but with reluctance and regret he followed an unreported decision of his own on the Midland Circuit[5], and gave judgment for the defendant. The case was taken by the plaintiff to the Court of Appeal, but the Court (Lord Esher M.R., Bowen and Kay L.JJ.) affirmed the judgment of Pollock B.

[1] 1681, 33 Car. II. Sir T. Raymond, 450.
[2] 1866, L. R. 1 Exch. 117, and 1867, L. R. 2 Exch. 135.
[3] 1886, 32 Ch. D. 266.
[4] 1893, 9 T. L. R. 397.
[5] *Devenish* v. *Waters*, Stafford Assizes.

It is submitted that the decision in *Case* v. *Barber* [1] and the dicta in *Morris* v. *Campbell* [2] and *Noble* v. *Ward* [3] make it at the least doubtful whether the cases of *Todd* v. *Johnson* [4] and *Macpherson* v. *Warner* [5] would have been decided in favour of the defendant thirty or forty years ago. And assuming that the later decisions are correct by reason of the altered views of the judges as to the validity or invalidity of contracts that do not satisfy the requirements of the Statute of Frauds, it is suggested that, if sections 4 and 17 are not to be repealed, there should be some amendment. It would be best to enact, in accordance with the opinion of some of the great sages of the Common Law in the early and middle parts of this century, that the contracts specified in the two sections, that do not satisfy the requirements thereof, are void altogether and for all purposes. Failing that, it would be well to enact that in an action founded on contract where the defendant pleads an agreement in bar he must plead it so that it may appear to the Court that an action will lie upon it, and he shall not take away the plaintiff's present right of action without giving him another upon the agreement pleaded.

ERNEST C. C. FIRTH.

[On the more or less analogous question of the effect of Statutes of Limitation on title to chattels, it has been held in Massachusetts that an owner has no right to retake his goods after his right to recover them by action is barred: and this expressly on the ground that a title which will not maintain a declaration will not maintain a plea: *Chapin* v. *Freeland*, (1886) 142 Mass. 383. This appears to be in favour of the principle contended for by Mr. Firth.

With regard to *Noble* v. *Ward*, we are at a loss to understand how any Court below the House of Lords can hold itself free to disregard an unanimous and quite modern decision of the Exchequer Chamber.—ED.]

[1] 1681, 33 Car. II, Sir T. Raymond, 450.
[2] 1854, 10 Exch. (1 H. & G.) 330.
[3] 1866, L. R. 1 Exch. 117, and 1867, L. R. 2 Exch. 135.
[4] 1892, May 12; not reported.
[5] 1893, 9 T. L. R. 397.

THE HAPPY DISPATCH.

IN an article which appeared in this REVIEW exactly a year ago on the subject of the Judges' Report on Practice from a Chancery point of view, the writer ventured to maintain that there was no reason why actions should not come on for trial after a fortnight from the issue of the writ if there were no pleadings, or within two months if there were pleadings. To those, who have grown up under the dilatoriness of a system which takes anything over a year to bring an action to trial, such a result would appear to be simply an impossibility. To such, and in fact to all who are interested in seeing an end put to what amounts to nothing less than a scandal, it may be not inappropriate to point out that the impossibility has been accomplished.

In the Law Reports for May 1893, P. 109, may be found the report of an Admiralty action called 'The Alps,' tried before Mr. Justice Gorell Barnes in February last. The most interesting part of the judgment from a public point of view is omitted from the authorized report, but it can be found in the Times Law Reports for February 15, from which the following extract is taken.

'Mr. Justice Gorell Barnes, in giving judgment for the plaintiffs, said,—The question in this case arises under a policy of marine insurance and is one of some interest which I will presently deal with. But I desire at the outset to notice a remarkable feature about the case to which it is extremely desirable that attention should be drawn, involving as it does a new and decidedly beneficial step in legal procedure. The proceedings in the action were commenced only about ten days ago and are of the utmost simplicity, consisting only of the writ, an application in Chambers to dispose of the matter in dispute under Order 34, Rule 2, and an order which I considered it right to make in order that the matter might be promptly disposed of. The order is to the effect that the question of law whether upon the facts stated in an average statement and certain documents therein referred to the plaintiffs are entitled to recover any and what sum from the defendants be tried without a special case to-day. Both parties being desirous of obtaining a speedy decision of the Court upon the point raised have availed themselves of the facilities which exist, though not ordinarily used, for this purpose. So far as my own experience goes, I cannot recall any case where this method of procedure has been adopted, but it is obvious that where both parties to a commercial case such as this are anxious to have their dispute determined at once, and do not insist upon the ordinary formalities, and particularly where there is little or no dispute of fact, this procedure affords the means

of enabling the parties to have their case argued and decided in open Court with rapidity and economy sufficient to satisfy the requirements of the commercial world. In my judgment, the parties and their solicitors have taken a most business-like course, which is worthy of every encouragement, and might be frequently followed with advantage in similar cases. I should add that, although actions of this kind have not usually been brought in this Division, yet such actions if brought here may be retained in the Division if the Court considers it expedient so to do, and, in my opinion, it is expedient that this action should be disposed of here under the circumstances, and very desirable and convenient that the wish of the parties to have it so dealt with should be acceded to.'

Of course not every action can be treated in this way. In the case decided by Mr. Justice Barnes ten days after the issue of the writ the facts were not in dispute. He himself says that the procedure is applicable where the parties 'do not insist upon the ordinary formalities and particularly where there is little or no dispute of fact.'

'Do not insist upon the ordinary formalities.' These are pregnant words. The ordinary formalities alluded to by the learned judge are evidently unnecessary formalities, otherwise they could not be dispensed with. Who then are in the habit of insisting on these ordinary but unnecessary formalities? The litigants themselves do not as a rule urge their legal advisers to carry on the action with all ordinary formalities regardless of cost. It is in truth much to be feared that both branches of the profession are to blame. There is not sufficient anxiety on the part either of barristers or of solicitors to conduct the action with the least possible delay and at the least possible cost. Unless however they are prepared to conduct actions with as few as possible of those ordinary formalities for which the rules of practice make such elaborate provision, they may as well make up their minds not to bring actions at all. People nowadays are not rich enough to indulge in ordinary formalities for the mere pride and luxury of the thing.

'Little or no dispute of fact.' In how many actions put down in the witness list is there much dispute of fact? Nominally in most of them, in reality in comparatively few. It has unfortunately become matter of common form to put every fact in issue on the pleadings, although it is perfectly well known beforehand that the action will turn on one or two points which alone are in dispute. The successful party gets his costs, which include those of any number of witnesses who are brought up to Court but never called. It seems as if actions are conducted in the manner which will inflict most punishment on the unsuccessful party, which before the trial each side considers to be synonymous with his opponent. Nobody

ever conducts an action so as to incur the least possible cost in the event of failure.

It may be affirmed without hesitation that if the party who took any unnecessary proceedings or refused to admit facts which he ought to have admitted or produced superabundant evidence was invariably punished (as he scarcely ever is) by having to pay the costs thereby occasioned whatever the result of the trial, at least half the witness actions which now block the Courts would resolve themselves into cases in which there was little or no dispute of fact, and as such might be decided if not within ten days yet within one month from the issue of the writ. For actions in which much evidence was required a longer time might be granted. At any rate, Mr. Justice Barnes having shown how to dispose of an action in which the facts are not in dispute within ten days, it is perfectly obvious, if it was not obvious before, that the year which has generally elapsed between the issue of the writ and the trial (in Chancery actions at any rate) is a ridiculous waste of time.

Unfortunately it is extremely difficult not to waste time and not to run up costs under the existing rules, which are apparently framed to encourage useless applications and to multiply unnecessary processes. It is almost incredible but it is a fact, as a glance at the Annual Practice will show, that our modern system of procedure is so elaborate that it requires over a thousand rules for its elucidation (save the mark!); over a thousand rules, of which, as was pointed out by the writer in his article of last year, for the most part those that are intelligible are not meant to be observed and those which are applicable are either unintelligible contradictory or superfluous. Until these rules are swept away and a simple procedure is substituted for them, which is incapable of being abused or taken advantage of by dishonest litigants or their advisers, the Courts will continue to sit for the purpose of administering not the justice of to-day but that of a year ago. In these days it avails not to be a year behind the time. So long as these rules exist, judges must be hampered if not tied hand and foot by them. What chance there is of any simplification of procedure being introduced may be gathered from the Judges' report on practice of last year, recommending not fewer but additional rules, which is much like Pitt's doctor insisting on his drinking more port wine as a cure for the gout.

There are however signs that the evil is curing itself. Actions no longer take so long as they did to come on for trial. But what is the reason? Simply that people are becoming so disgusted at the prolonged suspense and enormous cost in which even the simplest little action involves them that they are absolutely

refusing to have their differences settled by the proper and prescribed mode supposed to be suitable to civilized communities. One man takes the law into his own hands, and the other submits to justice or injustice as the case may be. A short time ago everybody was crying out for another Chancery Judge. Now nobody would think of suggesting such a thing. The Courts are rapidly catching up their arrears and if matters go on as they are now going, the question will be how to dispose of the one or two or three or four or five Chancery Judges with nothing to do.

To the legal profession this means ruin. One way however of escaping from this disagreeable result suggests itself. It is to be observed that the actions, which are tried by Mr. Justice Barnes in the manner described above, are as he himself admits not all of them strictly speaking admiralty cases. Most of them are rather commercial and might more appropriately be tried in the Queen's Bench Division. That division has however lost its commercial business for reasons which are only too well known. Mr. Justice Barnes is now making a most laudable and most successful effort to bring back to the fold for the shearing of the legal profession and the comfort of the shorn some portion at any rate of the sheep that have strayed. All that come within reach of his crook are dragged in, marked P. D. and disposed of with merciful celerity.

May it not be worth while to consider whether the method is not capable of considerable extension? Why should it be confined to cases where there is or was a ship or cargo in actual existence? All that is necessary is to resort to a legal fiction. Start the action in the Probate Division, entitle it 'The Happy Dispatch,' add In the Matter of some Act of Parliament, the Settled Land Acts for instance or the Trustee Acts or In the Matter of the Will of A. B. deceased, and the learned judge will give his decision on the sale of settled estates or will remove or appoint trustees or construe a will. Injunctions might be granted, estates administered, fraudulent trustees punished, specific performance decreed or refused, patents and trade marks protected. The simplification of legal procedure would be rapidly attained, until at last the other divisions would be merged in the Probate Division, and the Judges of the Chancery and the Queen's Bench Divisions having nothing of their own to do would be told off to the assistance of Mr. Justice Barnes who otherwise might find himself getting into that state of arrear from which it is his object to deliver us.

H. M. Humphry.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Römische Rechtsgeschichte, von MORITZ VOIGT. 1. Band. Leipzig: A. G. Liebeskind. 1892. 8vo. xii and 844 pp.

VOIGT's 'Römische Rechtsgeschichte' is the outcome of the lifelong efforts of a scholar devoted first and foremost to the investigation of the development and history of Roman law.

The foundation was laid some forty years ago, when Voigt began his researches into those general views and ideas which determined the course of legal development in Rome. The results were set forth in a work published in four volumes between the years 1856 and 1875 under the title, 'Das *ius naturale, aequum et bonum*, und das *ius gentium* der Römer.'

This was followed by a number of monographs dealing with particular problems in the history of Roman law. Among them the comprehensive treatise on the Twelve Tables, giving a complete account of the Civil and Criminal law and procedure under those statutes, is of special importance (Die XII Tafeln, 2 vols., Leipzig, 1883[1]).

Fully conscious, however, of the fact so often ignored by learned lawyers, that the law of a nation is necessarily dependent on its social and economic condition, Voigt, before beginning his great work, made those conditions the object of a special inquiry, in his treatise on 'Die römischen Privatalterthümer und die römische Kulturgeschichte' (published as a portion of the 'Handbuch der Klassischen Alterthumswissenschaft herausgegeben von Iwan Müller, 1887, vol. iv, pp. 747–931).

Thus prepared, Voigt took in hand his 'Römische Rechtsgeschichte,' a work which he very properly describes as an attempt to reconstruct the whole edifice of Roman legal history (see Preface, p. vi). His treatise, however, is confined (see p. 1) to Private law: it is intended to explain the history of the institutions and of the sources of Roman private law, from the Twelve Tables down to Justinian.

While he thus excludes the whole sphere of Public law, he, on the other hand, includes the history of the sources of Private law, which has usually been dealt with in the text-books on so-called 'äussere Rechtsgeschichte,' whereas the 'innere Rechtsgeschichte' has been confined to an account of the history of the institutions themselves. This severance of the history of legal thoughts from that of their form of expression is in the eyes of

[1] See the review in the LAW QUARTERLY REVIEW, vol. i. p. 235 seqq.

Professor Voigt, inadmissible. Neither the so-called 'internal' nor the 'external' history of law, nor both taken together, form in reality a history of Roman law.

With equal force our author objects to the arrangement usual in the text-books on the internal history, which, adopting as a basis the legal notions and divisions of the Empire, give a kind of systematic account of the various institutions, connecting with each of them an account of its historical development. It is obvious that this method entirely disregards the synchronisms existing between the institutions in the successive stages of their development: it fails to comprehend in a uniform picture the various legal events which mark any particular period of the history; and besides it does not show how these events are connected with and dependent on the life of the nation in general.

If these disadvantages are to be avoided, the subject-matter of the history of law must be dealt with in periods, which again can be determined only by reference to the great epochs which mark the changes in the civilization of the nation at large.

In accordance with these views Voigt distinguishes the following four periods:—

1. The time down to about the middle of the sixth century A. U. C., during which the original character of the Roman people is maintained in its integrity. From the legal point of view this is the period of exclusive rule of the *ius civile*, the close of which is marked by the issue of the *lex Aebutia* (513–517 A. U. C.).

2. The time down to the reign of Augustus (723 A. U. C.), during which the Roman character is changed and decomposed, especially by Hellenistic influences. It is a period during which the subject-matter of Roman law is enormously increased by the rise and development of the *ius gentium*, whilst new principles—those of equity—act upon the further formation of the law.

3. The time down to the division of the Empire after Diocletian (305 A. D.), when the western parts of the Empire, under the influence of provincial elements, acquire more and more a character of their own, and thus prepare the way for the final separation of the western (Roman) and the eastern (Hellenistic) empires. It embraces the period of the classical jurists, during which, though the creative power of law comes to a standstill, the theory of the law is worked out in all its detail.

4. The time down to the death of Justinian (565 A. D.), which marks the decay both of the spirit of antiquity in general and of Roman law in particular. In its legal aspect it may be described as the period of codification.

The portion of the work now published, the first volume, is divided into two parts. The first part (pp. 18–83), assigned to an exposition of the law of the first period, is comparatively very short. Voigt restricts himself to giving a brief account in outline of the Private law under the system of the Twelve Tables (§ 4), under the headings of (1) real rights, including *libertas*, *manus* (over persons and property), *hereditas* and *tutela*; (2) obligations, and (3) imperfect rights over other persons, as e. g. the right of a husband over his wife in a marriage without *manus* (see L. Q. R. l. c., pp. 237 foll.), adding to this an account of the great changes introduced by the subsequent recognition of the stipulation and the literal contract, the issue of the Lex Aquilia, and the introduction of the *testamentum per aes et libram* (§§ 5–9).

The second and chief part of the book (pp. 83–813), devoted to an exposition of the law of the later centuries of the Republic, deals in the first chapter with the social condition of the Roman people, the sources and the general doctrines of the law. In the three following chapters the author, under the three headings which he has adopted for the classification of the Private law of the Twelve Tables, gives a full account of the legal development of the second period, during which a great wealth of new legal ideas is imported into the law of Rome. He shows how the intercourse between Romans and aliens leads to the rise and rapid development of the *ius gentium* as a system of Private law applicable to all freemen within the vast territories under Roman rule, in opposition to the *ius civile* as a law peculiar to Roman citizens. It is due to this development that the various real and consensual contracts become recognized in addition to the formal contracts of the civil law; that side by side with quiritary *dominium* and the civil modes of acquisition, bonitary ownership, *bonae fidei possessio*, and the natural modes of acquisition obtain recognition; and that within the law of the family the *matrimonium non iustum* is acknowledged as a lawful form of marriage.

The *ius gentium*, so powerfully developing in the later centuries of the Republic, is in the main governed by the principles of equity, which fundamentally differ from the rigidity so characteristic of the old civil law. These principles naturally exercise an influence on the further development of the *ius civile* itself, though at the close of this period the two systems of the *ius civile* and the *ius gentium*, the *ius strictum* and the *bonum et aequum*, still stand side by side, reconciled neither in theory nor in practice.

These remarks will perhaps suffice to show that Professor Voigt is right, not only in adopting the division into periods, but also in placing the point of division where he does.

The reader may, however, be tempted to complain that no information is given on the period preceding the Twelve Tables; but he will in candour admit that, considering the fragmentary character of the authorities, it is impossible to give any more definite account of the earliest Private law.

It is a graver objection that owing to the great brevity of the outline of the Twelve Tables given in the first part, the reader who wishes to obtain a complete appreciation of the work is compelled to refer frequently to the author's voluminous treatise on the decemviral legislation.

But whatever may be the weight of these or other objections to Voigt's work—and it is by no means easy reading—they cannot impair the scientific value of the work, which certainly is one of the most important contributions of the present century to the literature of the history of Roman law.

E. Grueber.

Archbold's Pleading and Evidence in Criminal Cases. By Sir John Jervis, late Lord Chief Justice of the Common Pleas. The Twenty-first Edition, including *The Practice in Criminal Cases by Indictment*, by William Bruce, Stipendiary Magistrate for Leeds. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1893. 8vo. xciii and 1219 pp. (31*s.* 6*d.*)

The principal impression that one derives from an inspection of the twenty-first edition of Archbold, is that though the development and alteration of the Criminal Law since the publication of the twentieth edition,

have been neither extensive nor important; the intervening years, those, namely, from 1887 to 1892 inclusive, have constituted a period of remarkable legislative activity. The number of new statutes to which the editor has found it necessary to refer is thirty, and these include measures of such importance as the Merchandize Marks Acts (1887 & 1891), the Coal Mines Regulation Act, 1887, the Coroners Act, 1887, the Local Government Act, 1888, the County Courts Act, 1888, the Prevention of Cruelty to Children Act, 1889, the Arbitration Act, 1889, the Official Secrets Act, 1889, the Public Bodies Corrupt Practices Act, 1889, the Lunacy Act, 1890, and the Penal Servitude Act, 1891. In addition to the accounts given of some of these Acts, and references made to others, there have been incorporated in the present edition more or less of the substance of the Law of Libel Amendment Act, 1888, the Assizes Relief Act, 1889, the Stamp Duties Management Act, 1891, the Post Office Act, 1891, and the Betting and Loans (Infants) Act, 1892. From a merely technical point of view the most interesting of these is probably the Penal Servitude Act. This is an Act drawn with much care in exceedingly general terms, and accordingly some of its remote results might be matter of interesting speculation. One of the main objects which its authors had in view was to abolish the *minimum* penalty in some cases of unnatural crime, but they did not think proper to do so in the simplest way, by the repeal or amendment of the section of 24 & 25 Vict. c. 100 providing that penalty. In order to effect this substantial repeal beyond dispute, without saying anything about it, they had to frame as widely as possible the enactment that a Court might pass a sentence of imprisonment wherever a sentence of penal servitude was permitted by law. Among other consequences there is a nice point raised by Mr. Bruce as to whether all sentences of imprisonment with hard labour for more than two years have now become unlawful. Mr. Bruce thinks that they have. To us it appears highly doubtful whether a fresh statutory discretion to imprison for a time 'not exceeding two years' can take away an expressly conferred power to imprison for three years. The question, of course, is of merely speculative interest. This provision in the Penal Servitude Act has been followed by verbal amendments on a large scale of nearly all the sections in the Consolidation Acts, by the Statute Law Revision Act, 1892. It is almost a physical impossibility where numbers of sections in slightly different words have to be amended in different ways by the method of schedules, to make such an Act as the last-named absolutely correct, and one consequence is that there are at this moment a certain number of crimes for which judges have power to pass sentence of penal servitude for 'not exceeding seven,' the word 'years' having been inadvertently struck out of the sections. In dealing with the Oaths Act, 1888, Mr. Bruce does not give the form of oath which is usually administered under sect. 5 of the Act, to persons who 'desire to swear with uplifted hand.' The statute prescribes the 'form and manner' usual 'in Scotland,' but does not say what the form is. That upon which judges and criers appear to have agreed is to make the witness repeat after the crier, 'I swear by Almighty God, as I shall answer to God at the great day of judgment, that the evidence I shall give,' &c. ending with the usual formula. The principal defect that we have observed in the edition is the omission to give more than the barest reference to the Official Secrets Act, 1889. It is true that the Act has very seldom (if more than once) been put in force, but it is both important and clumsily drawn.

The new case-law in this edition is neither voluminous nor very important, and is incorporated with the rest of the work with the Editor's usual

skill. The edition has been used in practice during the weeks that have elapsed since its appearance, and has been found as convenient and trustworthy as hitherto.

Commentaries on Modern Equity Jurisprudence as determined by the Courts and Statutes of England and the United States. By Charles Fisk Beach, Jr. Two vols. New York: Baker, Voorhis & Co. 1892. ccxlviii and 1310 pp.

Pace Dr. Johnson, a great book is not necessarily a great evil. Mr. Beach's book is by no means an evil for the class of students and young practitioners to whose uses we conceive it to be addressed. But in one particular, the sin of accumulating case upon case, Mr. Beach has in our judgment gone wrong. In his twelve hundred pages of text, he cites, as we compute, over fifteen thousand cases. Some of these are illustrative and in point; others, many others, are not so. It is of course far easier to throw an undigested mass of cases at the reader's head than to 'nicely calculate' which of them are more, and which less, in point. Apart from this failing, Mr. Beach seems to have compiled a good book. He takes as his motto the late Sir George Jessel's well-known account (in *Knatchbull* v. *Hallett*, 13 Ch. Div. 696) of the modern rules of equity, and he claims to be the first to develop the idea of a modern equity in an extended treatise. Taking this line, he naturally ignores all but the most important of the older cases, but he has undertaken 'to cite and discuss all the recent cases found in our State and federal reports and in the English Law Reports.' This is indeed a Herculean labour. If Mr. Beach has cited all the cases, he certainly has not discussed them all. If he had, not even a law library would have contained the book that he had written. Seriously, we have turned carefully over —we will not say that we have read all— the pages of Mr. Beach's treatise and we have found no important point loose in his harness. Upon the subject of undue influence he might indeed have cited the recent case of *Allcard* v. *Skinner* (36 Ch. Div. 145). But upon the whole his work is carefully done and lucidly arranged. If it is not too formidable in appearance, avoirdupois and price, it will be a valuable help to the American student of law and it will be a good hunting-ground for practitioners, English and American. And this latter use, to matter-of-fact English eyes at least, is not the least important for a text-book. Mr. Beach is to be congratulated on having added an important treatise to the many legal works which he has already published.

A Treatise on the Law of Torts or Wrongs and their Remedies. By C. G. Addison. Seventh Edition, by Horace Smith and A. P. Perceval Keep. London: Stevens & Sons, Lim. 1893 .La. 8vo. lxxxix and 893 pp. (38*s.*)

'Addison,' the familiar storehouse of authorities on the law of torts in general, has lost none of its virtues in the hands of Mr. Horace Smith and Mr. Perceval Keep. That industry to which the 'Times,' the 'Law Reports,' and the Court of Appeal bear daily witness, has been brought to bear with excellent effect upon 'Addison.' Six years are enough to exhaust an edition of a treatise which is considered indispensable by many in Lincoln's Inn and by all in the Temple. There have been no great changes in the Statute Law

of torts during the last six years, but a multitude of decisions, some of the calibre of *Heaven* v. *Pender*, to which no one is better able to do justice than the reporter who spends his days at the feet of the Master of the Rolls. Thanks to a judicious process of excision this edition is only six pages longer than its predecessor, though it refers to four hundred more cases. And herein lies its great usefulness to practising lawyers. It is as a hunting-ground for authorities that the lawyer uses a text-book of this character. And though no lawyer who is worthy of the name accepts the statement of a case from a text-book without going to the pains of *petere fontes*, still he expects to find an accurate summary of the decisions referred to in his text-book. In that hope he will not be disappointed by the present edition of Addison's Torts. He will find himself referred to every case of any importance down to and including April last. Put he will not find the dates of the cases cited, which a growing custom may have led him to expect. Nor will he find references to any contemporaneous reports besides the 'Law Journal.' The one and only thing for which we have searched these pages in vain is that *rara avis*, jactitation of marriage, which has something in common with proceedings for defamation, but more perhaps of the nature of a criminal suit. However, it may well be that another century or so will pass before the Courts have such a suit as *Thompson* v. *Rourke* again.

The Law of Corporations and Companies. A Treatise on the Doctrine of Ultra Vires. Third Edition. By Seward Brice, Q.C. London: Stevens & Haynes. 1893. La. 8vo. xcv and 893 pp.

Mr. Brice's well-known work still occupies a unique position among books on Company Law. We have books on Railway Companies, on Municipal Corporations, on Trading Companies, on Insurance Companies, but this is the only one (Lindley on Companies perhaps excepted) which deals with the principles common to all corporate bodies. It was a singular misnomer to give it in the two first editions a title like 'Ultra Vires,' derived from the disabilities of companies. In this edition the author has wisely changed it to 'The Law of Corporations and Companies.' In thus taking all corporations and companies to be his province Mr. Brice has from the necessity of the thing been obliged to be general, but he has combined with it a very large mass of most useful detail on such matters as Profits, Capital, Securities, &c., and he has further illustrated his subject by numerous American decisions. Altogether he has produced a very valuable work. Mr. Brice is keenly sensible of the defects in the law of Trading Companies —indeed his preface might be styled 'The Abuses of Company Law Stript and Whipt,' to take an old title. The disclosure of contracts under s. 38, floating debentures, the arts of promoters, all come in for smart criticism. On all such points the opinion of Mr. Brice as a leading expert is entitled to great respect, but when he goes on to suggest more tinkering of Company Law we must really deprecate a remedy which is worse than the disease, unless Mr. Brice is prepared, like the would-be legislator in the assembly of Crotona, to propose his amendments with a halter round his neck to be immediately tightened if they fail. Nothing short of a general consolidation and redrafting of the Companies Acts, for which Parliament has neither the time nor the temper just now, would be of much avail.

The Science of International Law. By THOMAS ALFRED WALKER. London: C. J. Clay & Sons. 1893. 8vo. xvi and 544 pp.

THIS volume, 'comprising,' as we are told, 'the subject-matter of courses of lectures delivered at Cambridge,' seems to have been thrown into book form with unfortunate haste. Hence, probably, the absence of any table of contents, so that one has no other way of discovering the scope of the several chapters, or where the chapters begin and end, than by sedulously turning over the pages. Hence also more serious defects of substance, such as a lack of proportion in the treatment of topics, and a style which, especially in the first half of the work, is better adapted for journalism of a certain class than for what professes to be a contribution to science.

But the book is well worth reading, though its merits are not of a kind to justify its somewhat ambitious title-page. It is vigorously written; and it is learned, in the sense of utilizing a wide and first-hand acquaintance with chronicles, memoirs and biographies. Mr. Walker's knowledge of departments of literature not often laid under contribution for illustrations of International Law disposes one to expect much from his maturer labours upon the subject. It may be worth while to place on record, since the information has been acquired at the cost of some painstaking, that the topics dealt with by Mr. Walker are as follows: Chaps. i., ii., pp. 1, 41, The Nature of International Law; Chap. iii., p. 57, International Law before Grotius; Chap. iv., p. 91, Grotius; Chap. v., p. 112, Peace; Chap. vi., p. 239, War; Chap. vii., p. 374, Neutrality. The familiar departments of Law discussed in Chapters v., vi. and vii. are, however, disguised as 'Normal' and 'Abnormal Law,' a nomenclature which is not only without authority but can serve no useful purpose.

Palmer's Winding-up Forms and Practice. Second Edition. By F. B. PALMER, assisted by FRANK EVANS. London: Stevens & Sons, Lim. Ld. 8vo. 765 pp. (30*s.*)

UNDER Mr. Palmer's experienced conduct we may now follow a Company's fortunes from the cradle to the grave, nay beyond it in the resurrectionary Scheme of Reconstruction so common nowadays. Mr. Palmer's genius has shown itself in nothing more than in his recognition of the value of Forms and Precedents to the practising lawyer. To draw up minutes of an order or to frame a precedent is one of the most difficult of all the 'operations of the understanding' as well as the driest. If there is a special purgatory for lawyers they will probably be employed in this kind of penance. Hence they owe a peculiar debt of gratitude to Mr. Palmer and Mr. Frank Evans for these winding-up forms, numbering no less than 700 (exclusive of statutory forms), and adapted to every ordinary occasion in the chequered history of a Company, a gratitude all the more lively because Company forms are the one weak point of the otherwise admirable Seton and Daniell.

Primarily, as its title denotes, Mr. Palmer's book is a book of forms, but the forms are so skilfully grouped under the principal divisions as to present a survey, in chronological order, of the entire subject; while the valuable introductions to the chapters, with their concise summary of winding-up law and practice, make the book a thoroughly practical one. Such a subject-matter arrangement is by far the best, in fact the only intelligible way in which the complications of the new winding-up practice (that mosaic of rules, orders, cases, sections, and forms as curious as Burke's celebrated cabinet) can be dealt with. Even now a new Companies (Winding-

Up) Bill is before Parliament to enable a liquidator who has got damages against a delinquent director to make him, in default of payment, a bankrupt. These kaleidoscopic changes in Company law, necessary as they are, make the legal bookmaker groan, but the Legislature and the Rule Makers regard his troubles with Olympian indifference. As an eminent jurist has said, it is only the text-writers who make the present state of English law at all bearable, and this book shows the truth of the dictum. We can hardly bestow a higher commendation on it than by saying that it has every chance of becoming as popular as the author's 'Company Precedents.'

We have also received:—

The Duties of Solicitor to Client as to Sales, Purchases, and Mortgages of Land. By EDWARD F. TURNER. Second Edition by W. LLEWELLYN HACON. London: Stevens & Sons, Lim. 1893. 8vo. xvi and 264 pp. (10*s.* 6*d.*)—The first edition of this book was almost a verbatim reproduction of a course of lectures prepared for delivery at the Incorporated Law Society, but in this edition the original form of publication is departed from, and the substance of the lectures is presented in the form of a treatise. An attentive perusal shows that this book possesses considerable merits: it contains a clear and concise statement of the duties of a solicitor engaged in carrying out sales, purchases, or mortgages, and while it does not purport to discuss theoretical questions of law, it states the law, so far as the author deemed it necessary, with correctness. There are, however, a few statements in the book that we do not agree with. The author states (at p. 104) that 'where the limitations of an instrument are long and complicated, the plan is frequently adopted of stating in a narrative recital their effect only instead of reciting their actual words; for instance, that under or by virtue of a certain instrument specified, the estate was assured subject to preceding estates which have since determined or failed to take effect, to the use of *A* in fee simple. This expedient is not however approved of by well-instructed conveyancers.' We do not agree with the last remark; in our opinion the practice of the best conveyancers at the present day is to make recitals as concise as possible consistently with clearness, and accordingly they often content themselves with stating the effect of a series of deeds rather than reciting them verbatim. If the author had given a word of warning, if he had advised the inexperienced draftsman not to adopt this course, we should have agreed with him. Again (at p. 114) he uses language which might cause the student to think that the declaration of uses forms part of the habendum. While we feel certain that the author himself would not have fallen into this error, we regret that, probably through a moment's inattention, he has used language calculated to make the student fall into it. These points, and some few others that we might mention, will not however detract much from the value of the book. We venture to recommend it very strongly, not only to students in both branches of the profession, but also to the practising solicitor.

The Law of Landlord and Tenant, including the practice in ejectment. By JOSEPH HAWORTH REDMAN and GEORGE EDWARD LYON. Fourth Edition by JOSEPH HAWORTH REDMAN. London: Reeves & Turner. 1893. 8vo. lvi and 677 pp.—Seven years seems to be the time that an edition of this book lasts. In that time it has blossomed in price from five half-crowns to eight, and this increase in avoirdupois is accounted for by the number of statutes

and cases which have been passed and decided since 1886. Mr. Redman claims to have incorporated everything new that bears upon his subject, with the assistance of Mr. George Humphreys, and that only one important case remains unnoticed in its proper place in the text. We have found no reason to doubt this assertion, though it is a bold one. The book is an useful and well-arranged work, but it is hardly equal to displacing the familiar 'Woodfall' or even the more modern 'Fox' on legal shelves. The index is particularly good and full, occupying as it does nearly 120 pages out of the aggregate 677. We take leave to doubt the wisdom of quoting some but not all the references to contemporaneous reports. But with the substance and method of Mr. Redman's book we have no serious fault to find. It deserves to be considered, as it doubtless is, a serviceable book of reference.

A Digest of Cases relating to the construction of Buildings, the liability and rights of Architects, Surveyors, and Builders in relation thereto, with notes: and an Appendix containing Forms of Pleadings, Building Agreements and Leases, and conditions of Contracts, and some unreported cases. By EDWARD STANLEY ROSCOE. Third Edition. London: Reeves & Turner. 1893. 8vo. xvi and 164 pp.—The fact that this little manual has reached a third edition shows that it has been found useful. While it appears to be primarily intended for business men, the practising lawyer may use it with advantage.

The Indian Penal Code; with all Amendments and Notes, Analyses and Commentaries thereon. By REGINALD A. NELSON. Madras: Srinivasa, Varadachari & Co. 1893. 8vo. xii and 448 pp.—Mr. Reginald A. Nelson's edition of the Indian Penal Code seems to be well furnished with references to both Indian and English decisions. We suppose he has some reason for citing the volumes of the Law Reports by Roman numerals. Macaulay's notes to the Code in its original form might well have been more freely used, and we doubt whether the distinction between criminal and civil liability for defamation has been sufficiently marked.

Les Ministres, leur rôle et leurs attributions dans les différents états organisés. Par HENRI HERVIEU. Paris: L. Larose. 1893. 8vo. 782 pp. (12 fr.).—A full and apparently careful account of the constitutional law and practice of ministerial power and responsibility in the civilized countries of the world.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. X. 1808–1809. (15 & 16 Vesey—10 & 11 East (to p. 435)—1 Taunt.—1 Camp.) London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co. 1893. La. 8vo. xvi and 776 pp. (25*s.*)

A Treatise on the Law of Bills of Lading. By E. LEGGETT. Second Edition. London: Stevens & Sons, Lim. Calcutta: Thacker, Spink & Co. Bombay: Thacker & Co., Lim. 1893. 8vo. lxiv, cxiv and 671 pp. (30*s.*)—Review will follow.

A Guide to the Income Tax Acts for the use of the English Income Tax Payer. By ARTHUR M. ELLIS. Third Edition. London: Stevens & Sons, Lim. 1893. 8vo. xix and 359 pp. (7*s.* 6*d.*)

Company Law. By M. M. MACKENZIE, E. A. GEARE, and G. B. HAMILTON. London: Stevens & Sons, Lim. 1893. La. 8vo. lxiv and 443 pp. (21*s.*)—Review will follow.

A Manual for Parliamentary, County Council, and Municipal Election and Election Petitions. By P. J. BLAIR. Edinburgh: W. Green & Sons. 1893. 8vo. xv and 495 pp.

Privy Council Law. By GEORGE WHEELER. London: Stevens & Sons, Lim. 1893. La. 8vo. lii and 1044 pp. (31*s.* 6*d.*)—Review will follow.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
